127-661

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 273.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

SADIE P. McCONKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA

FILED AUGUST 19, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 273.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

SADIE P. McCONKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	2	1
Petition	2	1
Exhibit—Policy of insurance	5	2
Notice to defendant	6	6
Petition for removal	8	7
Bond for removal	10	7
Order for removal	12	8
Fee bill	13	9
Clerk's certificate	13	9
Answer	15	10
Verdict and plaintiff's remittitur	18	11
Motion for new trial	20	11
Order fixing time for hearing of motion for new trial	22	12
Motion to vacate entry of plaintiff's remittitur	23	12
Judgment	24	13
Bill of exceptions	26	13
Evidence for plaintiff	26	13
Policy of insurance sued on	27	17
Testimony of Mrs. Sadie P. McConkey	28	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 19, 1887.

	Original.	Print.
Evidence for defendant	49	29
Testimony of Thomas Kenny	49	29
Herman Hoppe	53	31
C. A. Mathewson	56	32
Samuel Liddle	61	34
A. B. Treece	63	34
J. H. Lockwood	65	35
S. S. Wooden	66	36
Dr. H. S. Herrick	67	36
C. A. Mathewson (recalled)	71	37
J. B. Mathewson	71	38
Edwin Moore	75	39
John Hartig	77	40
Mrs. Sadie P. McConkey	82	42
Evidence for plaintiff in rebuttal	83	43
Testimony of J. B. Mathewson	84	43
Mrs. Sadie P. McConkey	88	44
Exhibit B—Diagram	101	50
Defendant's requests	102	50
Charge to jury	105	52
Exceptions to charge	113	55
Authority to execute bond	123	57
Bond	124	58
Clerk's certificate	128	59
Citation	129	59
Writ of error	130	60
Assignment of errors	131	60
Prayer for reversal	160	68
Clerk's certificate	161	68

1 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

Pleas before the circuit court of the United States for the northern district of Iowa, eastern division, at a term begun and holden at the city of Dubuque, in said district, on the first Tuesday in April, A. D. 1885, before Honorable James M. Love, judge of the district court of the United States for the southern district of Iowa, appointed to hold said term of court in aid of Honorable Oliver P. Shiras, judge.

SADIE P. MCCONKEY
vs.
THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT. } No. 204. Law.

Be it remembered that heretofore, to wit, on the 15th day of April, A. D. 1884, a transcript was filed in the office of the clerk of this court in the words and figures following, to wit:

2 *Petition.*

In the Circuit Court of Iowa in and for Linn Co. Janu'y T., 1884.

SADIE P. MCCONKEY
vs.
THE TRAVELERS' INSURANCE CO. OF HARTFORD, CONNECTICUT.

Your petitioner, Sadie P. McConkey, would state that she is the widow of George P. McConkey, late of Hamilton, in the county of White Pine, in the State of Nevada, dec'd; that during the lifetime of her said husband, to wit, on the 7th day of November, 1882, the def't, to wit, The Travelers' Insurance Co. of Hartford, in the State of Connecticut, for the consideration of certain warranties made in the application, as well as the sum of twenty-five dollars then paid def't by said George P. Conkey, said def't then & there made, executed, and delivered to him an accident policy on the life of said George P. Conkey in the sum of five thousand dollars, to be paid to pl'ff herein, Sadie P. McConkey, in case of the death of said George P. McConkey happening within the time prescribed in said policy, to wit, one year from the 7th day of November, 1882, effected through external, violent, and accidental means, said sum to be paid pl'ff within ninety days after sufficient proof of death of said insured by
3 the means aforesaid, as per said policy of insurance hereto attached and made a part hereof will fully show.

That defen't was, at and before the date of said policy, and still is a corporation existing and duly incorporated under the laws of the State of Connecticut and doing business in said States of Nevada, Iowa, and Connecticut as such corporation duly authorized to issue policies of insurance against accident, and that such was then and now is the general business of said def't.

That after the making and delivery of said policy as hereinbefore stated, to wit, on or about the 2nd day of January, 1883, the said

George P. McConkey, while in his office, in Hamilton, White Pine Co., in the State of Nevada, was accidentally shot through the heart by a pistol or gun, loaded with powder & ball, by a person or persons unknown to pl'ff, by reason of which accidental injury said George P. McConkey then and there instantly died, of which accident and death said def't was duly and legally notified, as required by def't; that pl'ff sent said notice to def't, but did not retain a copy thereof and is now unable to attach a copy thereof hereto, as the same is — the possession of def't, and she asks that def't produce the same for the use and inspection of pl'ff; the defen't has failed and refused to pay said sum or any part thereof; that said sum of
4 five thousand dollars and interest from the 2 day of January, 1883, until paid is now justly due her; she therefore demands judgment for the sum of five thousand dollars and 6% interest thereon from the 2nd day of January, 1883, until paid & costs of suit.

WM. G. THOMPSON,
Att'y for Pl'ff.

STATE OF IOWA, }
County of Linn, } *ss:*

I, Sadie P. McConkey, being duly sworn, say that I am pl'ff in above cause; that I have heard the above petition read over and know the facts therein stated, and the same are true as I verily believe.

SADIE P. McCONKEY.

Sworn to and subscribed to before me by Sadie P. McConkey this 3 day of Dec'r, 1883.

[NOTARIAL SEAL.]

JOE D. LANNING,
Notary Public of Linn Co., Iowa.

5 (Copy.)

Principal sum, $5,000. Premium, $25.

The Travelers' Insurance Company of Hartford, Conn.,

In consideration of the warranties made in the application for this insurance and of the sum of twenty-five dollars, does hereby insure Geo. P. McConkey, by occupation, profession, or employment a county treasurer & local express agent, residing in Hamilton, county of White Pine and State of Nevada, in the principal sum of five thousand dollars, for the term of twelve months, ending on the seventh day of November, eighteen hundred and eighty-three, at 12 o'clock noon; the said sum insured to be paid to his wife, Sadie P. McConkey, if surviving (in event of her prior death said sum shall be paid to the legal representatives of the insured), within ninety days after sufficient proof that the insured, at any time within the continuance of this policy, shall have sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto

annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding twenty-five dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident:

Provided always, That this policy is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that all the statements and declarations made in the application for this insurance are warranted to be true in all respects, and that said application, together with the company's classification of hazards indorsed hereon, is referred to and made a part of this contract; and that if this policy, or any renewal thereof, has been or shall be obtained through misrepresentation, fraud, or concealment, or if any attempt shall be made by false swearing or suppression of any material fact on the part of the insured to obtain any sum under this policy or any renewal thereof, then the same shall be absolutely void:

Provided always, That this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly, in part, or jointly by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison or contact with poisonous substances, or by any surgical operation or medical or mechanical treatment; nor to any case except where the injury is the proximate and sole cause of the disability or death; and no claim shall be made under this policy when the death or injury may have been caused by dueling, fighting, wrestling, lifting, or by over-exertion, or by suicide (felonious or otherwise, sane or insane), or by sun-stroke, freezing, or intentional injuries inflicted by the insured or any other person, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, or when the death or injury may have happened while the insured was or in consequence of his having been under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances (unless insured to cover such occupation), or while engaged in or in consequence of any unlawful act; and this insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claim-

ant under this policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means.

Provided always, That if the insured shall travel or be beyond or without the limits of travel or residence hereinafter prescribed without first obtaining from this company or one of its agents a special permit, in writing, and paying the extra premium therefor, then this policy shall be wholly void as to all accidents occurring beyond such limits. Said limits of travel and residence are as follows, viz: The inhabited portions or civilized abodes of the United States, the Dominion of Canada and Newfoundland, and coastwise, by regular lines of passenger or mail conveyance, from port to port on the Atlantic or Pacific coast or Gulf of Mexico, but in no event to include any voyage past or around Cape Hatteras or upon the high seas without special permit and extra premium therefor. No indemnity shall be paid for loss of time resulting from accident occurring while the insured is without or beyond such limits:

Provided always, That all sums which may be paid by way of indemnity to the insured by virtue of this policy shall be accounted in diminution of the principal sum hereby insured, so that in case of subsequent death or injury during the continuance of this policy and within the year in which such indemnity may have been paid the total amount to be paid by the said company shall not in any case exceed the principal sum hereby insured.

Claims under this policy are payable only at the company's office, in Hartford, Conn.; and this policy is subject, also, to the following conditions:

1. The party insured is required to use all due diligence for personal safety and protection and to notify the secretary of this company immediately and in writing of any change from the occupation, profession, or employment under which this insurance is granted; he is insured under classification ——, as indorsed hereon, the same being a part of this contract, and this policy shall be wholly void as to all accidents occurring in any occupation, profession, employment, or exposure classed by the company as more hazardous than the classification under which he is insured, unless he shall have first procured from this company or one of its agents a written permit therefor and paid the additional premium required. ☞Standing, riding, or being upon the platforms of moving railway coaches other than street cars or riding in any other place not provided for the transportation of passengers or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion or walking or being on the road-bed or bridge of any railway are hazards not contemplated or covered by this contract; and no sum will be paid for loss of life or disability in consequence of such exposure or while thus exposed happening to any person other than railway employees who shall have given notice of such occupation and paid the fixed premium for such hazards.

2. In the event of any accidental injury for which claim may be made under this policy, immediate notice shall be given, in writing,

addressed to the secretary of this company, at Hartford, Conn., stating the full name, occupation, and address of the insured, with full particulars of the accident and injury; and also in case of death resulting from such injury immediate notice shall be given in like manner; and failure to give such immediate written notices shall invalidate all claims under this policy, and unless direct and affirmative proof of the same and of the death or duration of total disability shall be furnished to the company within seven months from the happening of such accident, then all claims accruing under this policy shall be waived and forfeited to the company.

3. No suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time the right of action accrues.

4. The insured shall not be entitled to indemnity for disabling injuries beyond the amount of his ordinary wages, salary, or the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks as aforesaid.

5. No claim shall be payable under this policy unless any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any alleged injury or cause of death when and so often as may be reasonably required on behalf of the company.

6. The total risks taken by this company on any one person under life and accident policies or tickets together are limited to sixteen thousand dollars for loss of life and eighty dollars weekly indemnity as aforesaid. No one claiming under policies or tickets or both for sums in excess of the amounts hereby limited shall be entitled to recover such excessive sums, but all premiums paid on tickets or policies for such excessive insurance shall be returned, on demand, to the insured or his legal representatives.

7. No assignment of this policy shall be valid unless made in writing, indorsed hereon, and unless a copy of such assignment shall be given to this company within thirty days after its execution, and any claim under this policy made by any assignee shall be subject to proof of interest.

8. If the company shall so elect, this policy may be canceled at any time by refunding to the insured the premium paid by him, less a *pro rata* part thereof for the time said policy has been in force.

9. The actual payment of premium before the happening of any accident under which claim for loss may be made, as well as all the provisions and conditions aforesaid and a strict compliance therewith during the continuance of this policy, are conditions precedent to the making of this contract. No waiver shall be claimed by reason of the act or acts of any agent, unless such act or waiver be specially authorized in writing, over the signature of the president or secretary of this company.

In witness whereof the Travelers' Insurance Company of Hartford has caused these presents to be signed by its president and attested by its secretary and delivered at the home office, in the city of Hartford, State of Connecticut, and this policy countersigned by Thomas Bennett, general agent of this company for Pacific Coast.

——— ———, *President.*
——— ———, *Secretary.*

Countersigned, at San Francisco, this 7th day of November, 1882.

THOS. BENNETT,
Gen. Agent.

(Form 100—edition Feb'y, 1882.)

5½ [Endorsed:] # 4006. In the circuit court — Iowa in and for Linn Co. January term, 1884. Sadie P. McConkey *vs.* Travelers' Insurance Company of Hartford, Connecticut. Petition. Filed Dec. 4, 1883. Geo. L. Stearns, clerk. W. G. Thompson, att'y for pl'ff. Copy fees, $5,00; 1.50 per —, 3.60.

6 *Original Notice.*

In the Circuit Court of Linn County, Iowa. January Term, A. D. 1884.

SADIE P. MCCONKEY
vs.
THE TRAVELERS' INSURANCE CO. OF HARTFORD, CONNECTICUT, Defendants.

To Travelers' Insurance Co.:

You are hereby notified that on or before the 10th day of December, A. D. 188–, there will be on file in the office of the clerk of the — court of Linn county, Iowa, the petition of the plaintiff aforesaid claiming of you the sum of *you* five thousand dollars and interest at 6 *per cent.* from 2nd day of January, A. D. 188–, as money justly due from you on policy of insurance by you to George P. McConkey, dated Nove'r 7, 1882, A. D., being policy No. 544,657. You are also notified that unless you appear thereto and defend before noon of the second day of the next term of said circuit court of Linn county, to be held at Marion, Iowa, on the 7th day of January, A. D. 1884, a default will be entered against you and judgment rendered thereon and decree as prayed in said petition.

WM. G. THOMPSON,
Attorney for Plaintiff.

7 STATE OF IOWA, *Linn County:*

Rece'd this notice on the — day of December, 1883, and on the 20th of December, 1883, the same was served on Travelers' Insurance Company of Hartford, Conn., by delivering to A. R. West, who is an agent for said company, at Cedar Rapids, Iowa, a true and correct copy hereof, together with a copy of the petition on file.

B. F. SEATON, *Sheriff,*
By F. H. SEATON, *D. Sheriff.*

Fees:

Mileage	70
Service	50
Copy	30
Service of pet.	50
	$2 00

8 In the Circuit Court of Linn County, State of Iowa.

SADIE P. MCCONKEY

vs.

THE TRAVELERS' INSURANCE CO. OF HARTFORD, CONNECTICUT.

To the honorable the circuit court in and for said Linn Co.:

Your petitioner respectfully shows to the honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of $500; that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Connecticut, and that Sadie P. McConkey, plaintiff herein, was then and still is a citizen of the State of Iowa.

And your petitioner offers herein a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the northern district of Iowa, on the first day of its next session, a copy of the record in this suit and for paying all costs that
9 may be awarded by said circuit court if said court shall hold that suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein except to make the order of remand required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Iowa; and he will ever pray, etc.

TRAVELERS' INSURANCE COMPANY,
By DYER, LEE & ELLIS &
C. B. KEELER, *Its Att'ys.*

10 *Bond.*

Know all men by these presents that the Travelers' Insurance Company of Hartford, Connecticut, as principal, and B. D. Lee and Mason P. Mills and G. F. Van Vection, as sureties, are held and firmly bound unto Sadie P. McConkey in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said Sadie P. McConkey, heirs and assigns, we bind ourselves, our heirs and assigns, jointly and severally, firmly by these presents. Yet upon these conditions: The said Travelers' Insurance Company having petitioned the circuit court of Linn county, State of Iowa, for the removal of a certain cause therein pending, wherein Sadie P. McConkey is plaintiff and the Travelers' Insur-

ance Company of Hartford, Connecticut, is defendant, to the circuit court of the United States in and for the northern district of Iowa:

Now, if the said Travelers' Insurance Company, said petitioner, shall enter in said circuit court of the United States, on the first day of its next session, copies of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit
11 court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this first day of January, A. D. 1884.

TRAVELERS' INSURANCE COMPANY, [L. S.]
By DYER, LEE & ELLIS, *Its Att'ys.* [L. S.]
B. D. LEE.
MASON P. MILLS. [L. S.]
G. F. VAN VECTION. [SEAL.]

STATE OF IOWA, } ss:
Linn County, }

We, Mason P. Mills and G. F. Van Vection, being duly sworn, depose and say, and each for himself says, that he is one of the sureties *in the sureties* in the foregoing bond; that he is a resident of the State of Iowa; that he is worth the sum of ten thousand dollars beyond the amount of his debts; that he has property in the State of Iowa liable to execution equal to the sum of ten thousand dollars.

MASON P. MILLS,
G. F. VAN VECTION,
By MASON P. MILLS &
G. F. VAN VECHTEN.

Subscribed and sworn to before me this 7th day of January, A. D. 1884.

W. LE ROY CRESSMAN,
Notary Public in and for Linn Co., Iowa.

12 STATE OF IOWA, } ss:
Linn County, }

Be it remembered that — a term of the circuit court within and for the county and State aforesaid, begun and holden at the court-house in the city of Marion on the 7th day of January, A. D. 1884, Hon. C. Hedges, sole judge *sole judge* of the circuit court of the 8th judicial district of said State, presiding, on second day of said term, it being the 8th day of January, A. D. 1884, among other, the following proceedings were had, done, and entered of record, to wit:

SADIE MCCONKEY
vs.
THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT. } 4006.

And now, to wit, January 8th, 1884, this cause comes on for hearing upon defendant's petition for a change of forum, W. G. Thomp-

son appearing for the plaintiff and Dyer, Lee and Ellis and C. B. Keeler appearing for the defendant; and it appearing to the court that said defendant has filed herein the petition, affidavit, and bond, as in such cases required by statute, and being fully satisfied
13 in the premises:

It is therefore ordered that this cause be, and the same is hereby, transferred to the circuit court of the United States, northern district of Iowa, eastern division, to be held at Dubuque, Iowa.

Fee Bill.

Clerk's fees:

Dock't'g fee, 1.50; tax costs	$2 00*
Order of change to U. S. C.	50†
Cert'd copy of record	75†
App'g bond for removal	50†
D. A. Stearns, copy fees for trans.	4 25†
B. F. Seaton, sh'ff, serving original notice	2 00
W. G. Thompson, copy fees for pet.	3 60
	$13 60

*$1.50 paid by pl't'ff, 50c. paid by att'y.
†Paid by Mills & Keeler, pl'ff's att'ys.

STATE OF IOWA, } ss:
Linn County, }

I, Geo. L. Stearns, clerk of the circuit court of the State of Iowa in and for said county, do hereby certify that the foregoing is a true copy of all the papers and court records in the case of Sadie P. McConkey *vs.* Travelers' Ins. Co. as fully as the same remains of record in my office.

Witness my hand and seal of said court hereto affixed, at my office in Marion, in said county, on this 18th day of January, 1884.
[L. S.] GEO. L. STEARNS, *Clerk.*

14 [Endorsed:] No. 204. Sadie P. McConkey *vs.* Travelers' Insurance Company, def't. Transcript of record in said cause. Filed this 15 day of April, A. D. 1884. A. J. Van Duryee, yee, clerk, by Alfred Hobbs, deputy. Dyer, Lee & Ellis, St. Louis; Henderson, Hurd & Daniels, for def'ts.

And afterwards, to wit, on the 18th day of November, A. D. 1884, there was filed in this court an answer in the words and figures following, to wit:

15 *Answer.*

In Circuit Court of the United States, Northern District of Iowa, Eastern Division.

SADIE P. McCONKEY

vs.

THE TRAVELERS' INSURANCE CO. OF HARTFORD, CONNECTICUT, Defendant.

I.

Defendant, for answer to the petition herein, denies that the death of the insured was occasioned by bodily injuries effected through external, violent, and accidental means (or affected through external violence and accidental means), within the intent and meaning of the contract of insurance and the conditions thereunto annexed.

II.

And for further answer of said petition defendant says that the death of the insured was caused by suicide.

III.

And for further answer to said petition defendant says that the death of the insured was caused by intentional injuries inflicted by the insured or some other person.

16 IV.

And for further answer to said petition defendant says that the death of the insured was caused by intentional injuries inflicted by some other person than the insured.

DYER, LEE & ELLIS,
HENDERSON, HURD & DANIELS,
Attorneys for Defendant.

STATE OF CONNECTICUT, }
County of Hartford, } *ss:*

I, J. G. Batterson, being duly sworn, depose and say that I am an officer, to wit, the president of the defendant in the above-entitled action; that I know the contents of the foregoing answer and believe the statements of divisions I and III thereof to be true, and as to the defenses set up in divisions II and IV, I believe one or the other to be true, but cannot determine which.

J. G. BATTERSON.

Subscribed and sworn to by the said J. G. Batterson before me, a notary public in and for said State and county, this 19 day of June, 1884.

[L. S.] WALTER G. COWLES,
Notary Public.

17 [Endorsed:] No. 204. Sadie P. McConkey, pl'ff, *vs.* Travelers' Insurance Co., defen't. Answer of defendant. Filed Nove'r 18, 1884. A. Hobbs, dep. clerk U. S. c't c't.

18 United States Circuit Court, Northern District of Iowa, Eastern Division.

FRIDAY, 17*th day of April, A. D.* 1885.

Tenth day.

Hon. James M. Love, judge presiding.

SADIE P. MCCONKEY
vs.
THE TRAVELERS' INSURANCE CO. } No. 204. Law.

This cause again coming on to be heard, the jury and counsel being all present, and the evidence and arguments of counsel having been heard, the cause was submitted to the jury by the court and the jury retired to consider their verdict; after due deliberation they returned into court and returned into court the following verdict, viz:

"We, the jury, find for the plaintiff and assess the damages at five thousand six hundred — ($5,600.00).

Dubuque, April 17, 1885.

SAMUEL BRADEN, *Foreman.*

19 The plaintiff thereupon, by her attorneys, in open court remitted from the amount of said judgment the sum of six hundred & ten ($610.00) dollars; to which the defendant at the time duly excepted and filed his motion for a new trial.

And afterwards, to wit, on the 17th day of April, A. D. 1885, there was filed in said court a motion in the words and figures following, to wit:

20 *Motion.*

In Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

SADIE P. MCCONKEY *vs.* THE TRAVELERS' INSURANCE COMPANY.

Now comes defendant and moves the court that the judgment herein may be vacated and that a new trial may be granted herein, for that the trial court may have erred in the construction of the policy of insurance herein in holding and instructing the jury that the words of the policy "intentional injuries inflicted by the insured

or any other person" had reference only to an intention on the part of the insured and did not include murder or injury inflicted intentionally by another person than the insured without the volition or consent of the insured.

And in this connection defendant complains of the instructions given by the court on this subject and now in writing among the files of this court and duly excepted to by defendant at the time, and defendant complains that there was error in the giving such instructions and each thereof.

21 And complain in like manner that there was error in refusing instructions upon the same subject asked by defendants as asked, and which are among the files as aforesaid, and to which refusal defendant excepted at the time.

And defendant complains that the giving and refusal of instructions as aforesaid and the construction of said policy as aforesaid were prejudicial to the rights of defendant, and defendant prays a full consideration thereof.

And defendant further complains of the instructions given by the court and of the refusal to give those asked by defendant (the same being among the files and duly excepted to as aforesaid) upon the question of the burden of proof, and prays that this question may also be considered upon this motion, and defendant prays that this motion may stand also as a motion for a new trial and may be set down for hearing at a convenient time, and that execution may be stayed pending the hearing.

HENDERSON, HURD & DANIELS,
Attorneys for Defendants.

22 APRIL 17, 1885.

Ordered, That the above motion be heard at the May term, 1885, at Des Moines, and that meantime execution be stayed until the hearing.

J. M. LOVE, *Judge.*

Endorsed as follows: No. 204. Sadie P. McConkey *vs.* Travelers' Insurance Co. Mo. to vacate j't, &c. Filed April 17, 1885. A. Hobbs, dep. clerk U. S. c't c't.

And afterwards, to wit, on the 7th day of May, 1885, there was filed in said court a motion to vacate the entry of plaintiff's remittitur, in the words and figures following, to wit:

23 *Motion.*

In Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

SADIE P. MCCONKEY, Plaintiff,
vs.
THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Defendant.

Defendant moves the court to vacate the entry of plaintiff's remittitur of $610 from the amount of $5,600 found by the jury in their

verdict, and to disallow such remittitur and to correct the records of this court by expunging said entry therefrom.

DYER, LEE & ELLIS,
HENDERSON, HURD & DANIELS,
Attorneys for Defendants.

Endorsed as follows: Sadie P. McConkey *vs.* Travelers' Insurance Co. Motion. Filed May 7, 1885. Alfred Hobbs, dep. clerk U. S. c't court.

24 *Judgment.*

TUESDAY, *9th day of June, A. D.* 1885.

Twenty-second day.

Hon. Oliver P. Shiras, presiding.

SADIE P. MCCONKEY, Plaintiff,
vs.
THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Defendant. } No. 204. Law.

And now, on this 9th day of June, A. D. 1885, this cause coming on to be heard upon defendant's motions for new trial and to vacate the entry of plaintiff's remittitur of $610.00 from the amount of $5,600.00 found by the jury in their verdict, and the court being fully advised in the premises, it is ordered by the court that the motion for new trial be overruled and that the motion to vacate the entry of said remittitur and to disallow said remittitur be sustained, and that said remittitur be disallowed, vacated, and set aside; and thereupon it is considered by the court that said plaintiff
25 have and recover of and from said defendant, The Travelers' Insurance Company of Hartford, Connecticut, the sum of five thousand six hundred dollars, together with the costs of this action, taxed at $158.62.

To all of which both parties duly excepted.

And, to wit, on the 5th day of May, A. D. 1885, there was filed in said court a bill of exceptions in the words and figures following, to wit:

26 *Transcript of Testimony.*

THE UNITED STATES OF AMERICA:

In Circuit Court, Northern District of Iowa. April Term, A. D. 1885.

SADIE P. MCCONKEY *vs.* TRAVELERS' INS. CO.

Be it remembered that at a regular term of the circuit court of the United States of America, held at Dubuque, Iowa, at said time, among other proceedings, came on for trial the above-entitled cause to a jury, when the following testimony was produced and offered in the manner and order as herein set forth.

Plaintiff offers in evidence the policy in suit in the following words and figures, to wit:

26½ Principal sum, $5,000. Premium, $25.00

The Travelers' Insurance Company of Hartford, Conn.,

In consideration of the warranties made in the application for this insurance and of the sum of twenty-five dollars, does hereby insure George P. McConkey, by occupation, profession, or employment a county treasurer & local express agent, residing in Hamilton, county of White Pine and State of Nevada, in the principal sum of five thousand dollars, for the term of twelve months, ending on the seventh day of November, eighteen hundred and eighty-three, at 12 o'clock noon; the said sum insured to be paid to his wife, Sadie P. McConkey, if surviving (in event of her prior death said sum shall be paid to the legal representatives of the insured), within ninety days after sufficient proof that the insured, at any time within the continuance of this policy, shall have sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding twenty-five dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident:

Provided always, That this policy is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that all the statements and declarations made in the application for this insurance are warranted to be true in all respects, and that said application, together with the company's classification of hazards indorsed hereon, is referred to and made a part of this contract; and that if this policy, or any renewal thereof, has been or shall be obtained through misrepresentation, fraud, or concealment, or if any attempt shall be made by false swearing or suppression of any material fact on the part of the insured to obtain any sum under this policy or any renewal thereof, then the same shall be absolutely void:

Provided always, That this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly, in part, or jointly by bodily infirmities or disease existing prior or subsequent to the date of this

contract, or by the taking of poison or contact with poisonous substances, or by any surgical operation or medical or mechanical treatment; nor to any case except where the injury is the proximate and sole cause of the disability or death; and no claim shall be made under this policy when the death or injury may have been caused by dueling, fighting, wrestling, lifting, or by over-exertion, or by suicide (felonious or otherwise, sane or insane), or by sun-stroke, freezing, or intentional injuries inflicted by the insured or any other person, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, or when the death or injury may have happened while the insured was or in consequence of his having been under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances (unless insured to cover such occupation), or while engaged in or in consequence of any unlawful act; and this insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claimant under this policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means.

Provided always, That if the insured shall travel or be beyond or without the limits of travel or residence hereinafter prescribed without first obtaining from this company or one of its agents a special permit, in writing, and paying the extra premium therefor, then this policy shall be wholly void as to all accidents occurring beyond such limits. Said limits of travel and residence are as follows, viz: The inhabited portions or civilized abodes of the United States, the Dominion of Canada and Newfoundland, and coastwise, by regular lines of passenger or mail conveyance, from port to port on the Atlantic or Pacific coast or Gulf of Mexico, but in no event to include any voyage past or around Cape Hatteras or upon the high seas without special permit and extra premium therefor. No indemnity shall be paid for loss of time resulting from accident occurring while the insured is without or beyond such limits:

Provided always, That all sums which may be paid by way of indemnity to the insured by virtue of this policy shall be accounted in diminution of the principal sum hereby insured, so that in case of subsequent death or injury during the continuance of this policy and within the year in which such indemnity may have been paid the total amount to be paid by the said company shall not in any case exceed the principal sum hereby insured.

Claims under this policy are payable only at the company's office, in Hartford; and this policy is subject, also, to the following conditions:

1. The party insured is required to use all due diligence for personal safety and protection and to notify the secretary of this company immediately and in writing of any change from the occupation, profession, or employment under which this insurance is granted;

he is insured under classification preferred, as indorsed hereon, the same being a part of this contract, and this policy shall be wholly void as to all accidents occurring in any occupation, profession, employment, or exposure classed by the company as more hazardous than the classification under which he is insured, unless he shall have first procured from this company or one of its agents a written permit therefor and paid the additional premium required. ☞Standing, riding, or being upon the platforms of moving railway coaches other than street cars or riding in any other place not provided for the transportation of passengers or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion or walking or being on the road-bed or bridge of any railway are hazards not contemplated or covered by this contract; and no sum will be paid for loss of life or disability in consequence of such exposure or while thus exposed happening to any person other than railway employees who shall have given notice of such occupation and paid the fixed premium for such hazards.

2. In the event of any accidental injury for which claim may be made under this policy, immediate notice shall be given, in writing, addressed to the secretary of this company, at Hartford, Conn., stating the full name, occupation, and address of the insured, with full particulars of the accident and injury; and also in case of death resulting from such injury immediate notice shall be given in like manner; and failure to give such immediate written notices shall invalidate all claims under this policy, and unless direct and affirmative proof of the same and of the death or duration of total disability shall be furnished to the company within seven months from the happening of such accident, then all claims accruing under this policy shall be waived and forfeited to the company.

3. No suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time the right of action accrues.

4. The insured shall not be entitled to indemnity for disabling injuries beyond the amount of his ordinary wages, salary, or the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks as aforesaid.

5. No claim shall be payable under this policy unless any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any alleged injury or cause of death when and so often as may be reasonably required on behalf of the company.

6. The total risks taken by this company on any one person under life and accident policies or tickets together are limited to sixteen thousand dollars for loss of life and eighty dollars weekly indemnity as aforesaid. No one claiming under policies or tickets or both for sums in excess of the amounts hereby limited shall be entitled to recover such excessive sums, but all premiums paid on tickets or policies for such excessive insurance shall be returned, on demand, to the insured or his legal representatives.

7. No assignment of this policy shall be valid unless made in writing, indorsed hereon, and unless a copy of such assignment shall

be given to this company within thirty days after its execution, and any claim under this policy made by any assignee shall be subject to proof of interest.

8. If the company shall so elect, this policy may be canceled at any time by refunding to the insured the premium paid by him, less a *pro rata* part thereof for the time said policy has been in force.

9. The actual payment of premium before the happening of any accident under which claim for loss may be made, as well as all the provisions and conditions aforesaid and a strict compliance therewith during the continuance of this policy, are conditions precedent to the making of this contract. No waiver shall be claimed by reason of the act or acts of any agent, unless such act or waiver be specially authorized in writing, over the signature of the president or secretary of this company.

In witness whereof the Travelers' Insurance Company of Hartford has caused these presents to be signed by its president and attested by its secretary and delivered at the home office, in the city of Hartford, State of Connecticut, and this policy countersigned by Thomas Bennett, general agent of this company for Pacific coast.

J. G. BATTERSON, *President.*
RODNEY DENNIS, *Secretary.*

Countersigned, at San Francisco, this 7th day of November, 1882.

THOMAS BENNETT,
Gen'l Agent.

(Form 100—edition Feb'y, 1882.)

27 [Endorsed.]

Accident Policy on the Life of George P. McConkey.

Travelers' Insurance Company of Hartford, Conn. Capital, $600,000.

Number, 544,569.
Date, Nov'r 7, 1882.
Term of twelve months.
Amount insured, $5,000.
Weekly indemnity, $25.00.
Premium, $25.00.

THOS. BENNETT,
Gen'l Agent, San Francisco, Cal.

Classification Referred to in the Policy.

(See condition 1 within.)

Class No. 1. "Preferred."

Rate.—$5.00 per $1,000 insurance and $5.00 weekly indemnity or $3.00 per $1,000 for death only; $3.50 for $5.00 indemnity only.

Class No. 2. "Extra preferred."

Rate.—$6.00 per $1,000 insurance and $5.00 weekly indemnity or $3.60 per $1,000 for death only; $4.20 for $5.00 indemnity only.

Class No. 3. "Ordinary."

Rate.—$7.50 per $1,000 insurance and $5.00 weekly indemnity or $4.50 per $1,000 for death only; $5.25 for $5.00 indemnity only.

Class No. 4. "Extra Ordinary."

Rate.—$8.00 per $1,000 insurance and $5.00 weekly indemnity or $5.00 per $1,000 for death only; $5.60 for $5.00 indemnity only.

Class No. 5. "Medium."

Rate.—$10.00 per $1,000 insurance and $5.00 weekly indemnity or $6.00 per $1,000 for death only; $7.00 for $5.00 indemnity only.

Class No. 6. "Special."

Rate.—$12.50 per $1,000 insurance and $5.00 weekly indemnity or $7.50 per $1,000 for death only; $8.75 for $5,000 indemnity only.

Class No. 7. "Hazardous."

Rate.—$15.00 per $1,000 insurance and $5.00 weekly indemnity or $9.00 per $1,000 for death only; $10.50 for $5.00 indemnity only.

Class No. 8. "Engineers' class."

Rate.—$18.00 per $1,000 insurance and $5.00 weekly indemnity or $10.00 per $1,000 for death only; $12.60 for $5.00 indemnity only.

Class No. 9. "Extra hazardous."

Rate.—$20.00 per $1,000 insurance and $5.00 weekly indemnity or $12.00 per $1,000 for death only; $14.00 for $5.00 indemnity only.

Class No. 10. "Special hazardous."

Rate.—$25.00 per $1,000 insurance and $5.00 weekly indemnity or $15.00 per $1,000 for death only; $17.50 for $5.00 indemnity only.

Class No. 11. "Extra special hazardous."

Rate.—$30.00 per $1,000 insurance and $5.00 weekly indemnity or $18.00 per $1,000 for death only; $21.00 for $5.00 indemnity only.

Class No. 12. "Special contract."

Notice Respecting Assignments.

(See condition No. 7 within.)

The principal sum insured herein can be assigned only by the person or persons to whom it is by the terms of the policy made

payable; and such principal sum is always subject to diminution to the extent of the weekly indemnity paid to the insured during the policy year.

The weekly indemnity herein insured can be assigned only by the person whose life is insured.

A copy of every assignment must be given to the company within thirty days after its execution.

28 The diagram attached to the depositions in this case and marked Exhibit "B" is conceded and accepted as practically correct.

Mrs. SADIE P. MCCONKEY, called as a witness on behalf of plaintiff, testified as follows on direct examination:

1. You are the plaintiff in this case, are you?
A. Yes, sir.

COUNSEL FOR PL'FF: There is no question about any proof of loss, is there, gentlemen?

By COUNSEL FOR DEF'T: No; there is no question raised about the proof of loss.

By the COURT: Then let it be admitted that the proof of loss is made.

2. Your name is Sadie P. McConkey?
A. Yes, sir.
3. You were the wife of George P. McConkey, the person mentioned in that policy, were you?
A. Yes, sir.
4. Where did you live in 1882?
A. Hamilton, White Pine county, Nevada.
5. How long had you been married to Mr. McConkey?
A. Since 1874. 6 *since* 1874.
6. How many children did you have?
A. Two. *Two.*
29 7. How old were they in January, 1883?

Objected as immaterial.

By the COURT: I don't see that that is material.

By COUNSEL: Well, it may not be now, your honor.

By the COURT: Well, if it ever shall be, then you can introduce it.

8. Your husband lived at Hamilton, White Pine county, Nevada?
A. Yes, sir.
9. Do you recollect the night of the first of January, 1883?
A. Yes, sir.
10. How old was your husband?
A. Between 36 and 37.
11. How long had you lived together at Hamilton?
A. Since '74. We were married, and went right there.
12. You were married in 1874 and went there to live?

A. Yes, sir.

13. And had lived there continuously, had you, up to the time of his death?

A. Yes, sir.

14. What was his business?

A. He was treasurer for White Pine county and special agent for the express *county*.

15. What express company?

A. Wells, Fargo and Company.

30 16. Where did he do business?

A. In Mathewsen Brothers' store.

17. Was he also engaged in their employ?

A. Yes, sir.

18. They had a general store, had they?

A. Yes, sir.

19. Did he keep both offices—the office of Wells, Fargo & Co. and the county treasurer's office—all in Mathewsen Bros.' store?

A. Yes, sir.

20. Now, on the evening of the 1st of January, or at least on the night or evening of the 1st of January, what time did your husband come home?

A. About half past eight.

21. About half past eight?

A. Yes, sir.

22. Was there any public party that night?

A. Yes, sir.

23. What was it?

A. A New Year's ball.

24. Where did it occur—where was it to come off?

A. At Withington Hall.

25. Did you attend?

A. I did.

26. Who went with you?

A. Miss Lizzie Hoil and Mr. Ira McKnight.

27. And who else?

A. The four of us went in a cutter.

31 28. Well, who was the fourth one; your husband was the fourth one, was he?

A. Yes, sir; my husband.

29. What time did you get to the ball?

A. A little after nine.

30. Yes.

A. Between nine and ten.

31. Between nine and ten?

A. Yes, sir.

32. How long did your husband stay there with you, if at all?

A. Until some time between ten and eleven.

33. Where did he go then?

A. To the office, I presume.

34. What did he say when he went away?

Objected to as immaterial.

By the COURT: I think that's proper, because it may tend to show his state of mind at the time.

By COUNSEL FOR PL'FF: It bears upon the question of the cause of his death, whether it may or may not be suicide. Answer the question, please, What did he say or where did he say he was going, and what did he say he was going to do?

A. He said he was going to the store to work on the books, and he would come for me at supper time; that would be twelve o'clock.

35. At supper time, which would be twelve o'clock?

32 A. Yes, sir.

36 How far was the office from the place where the ball was being held.

A. About a block and a half.

37. About a block and a half?

A. Yes, sir.

38. Well, did he return at the time he said he would?

A. No, sir.

39. Did he return at all?

A. No, sir.

40. Did not?

A. No, sir.

41. How did you come to discover where he was and what his condition was. Just explain in your own way, and fully.

A. I said the Withington building was a block and a half to the store, and the blocks are not as they are here. I said a block and a half.

42. Yes.

A. The blocks are not like they are here, the streets are more—the streets run more off in that way—but I should judge it was a block and a half.

43. The distance of a block and a half?

A. Yes; it may be a little more or a little less.

44. Yes.

33 A. He promised to come after me at suppertime, and not coming I became anxious for him and asked this Mr. Kenny to go with me, and we went to the store.

45. Asked who?

A. Mr. Kenney.

46. Yes, ma'm?

A. We went to the store and he wasn't there. We went back to the supper-room and I waited for him, and he didn't come, and I went back to the ball-room and stayed there until some time between two and four—I don't know exactly what time—and became anxious and went again to the store.

47. Yes.

A. And, not being able to get into the store, we went to Mr. Mathewson for the key to open it, and found him lying there.

48. Now, then, where was Mr. Mathewson's place, the house to which you went?

A. Just above the store.

49. Well, you went into the store, did you?
A. Yes, sir.
50. Well, describe to the jury as well and as near as you can just where you found him and how you found him—your husband.
A. Well, there are four doors to the store; the lower door is
34 the one in which we entered, passed through the store and up a flight of steps—two or three steps—through a gate at the end of the counter, turned around the counter and around that way and found him lying on the floor, on his back, against the safe.

The diagram "Ex. C" shown witness.

51. Do you see that diagram?
A. Yes, sir.
52. Well, get it in your mind. Do you understand that now to be the diagram?
A. Well, where are the doors?
53. Well, the doors don't appear to be in that; let's see where they put the doors.

By COUNSEL FOR DEF'T: The doors are here.
Another diagram shown witness, "B."

54. These are four doors, you see, in front?
A. Yes, sir.
55. That's what's called the general store, I suppose?
A. Yes, sir.
56. Four doors, all of them alike, so far as their appearance go?
A. Yes, sir.
57. Or appearance goes?
A. Yes, sir.
58. Now, then, which door did you enter?
A. This one.
59. The door in the grocery department?
35 A. Yes, the lower door.
60. Do you know about how wide that building is between the four doors; how wide—have you an idea about how wide that building was?
A. No, sir.
61. Well, on one side there was a grocery department, was there?
A. Yes, sir.
62. You entered into the part that's known as the grocery department, and do you know which way the store runs—north and south or east and west?
A. It runs this way—north, east, and west.
63. Do you know where the grocery department was—on the west or on the east of the building?
A. Well, it was towards the west, came west, this way, and the store faces this way.
64. Well, it was towards the west?
A. Yes, sir.
65. Well, we'll call that a westerly direction. Now, then, you don't know how wide that department was?

A. No, sir.

66. That's a counter that runs there through on an arch—that's an arch, called an arch?

A. It's an arch.

67. Yes, that's a partition in here and an arch in there.

A. Yes, sir.

36 68. Now, then, what's in the next department, between the arch and the counter, that appears to be marked "C" there. How was that occupied?

A. There was shelves that had some things on it.

69. Just a kind of a store-room as well as for shelves?

A. Yes, sir.

70. Now, then, on the east side how was it occupied?

A. In here?

71. Yes; was the post office in there?

A. Yes, sir.

72. And then back of the post office Wells, Fargo and Company's office.

A. It was all in together.

73. All in together, the post office, and Wells, Fargo & Company's office, and the county office?

A. Yes, sir.

74. Yes; now then, stand here, please; that door that's in that grocery department, I understand you to say, is the one you unlocked and entered?

A. Yes, sir.

75. Is that correct?

A. Yes, sir.

37 76. Now, then, state how you went, which way you went, and where you went to; went up to the arch and through the arch and down to the gate. Did that gate separate Wells, Fargo and Company's office and the post office and the treasurer's office from the rest of the store?

A. Yes, sir; it did.

77. Now, it was but a small gate, I take it; was it not?

A. Yes, sir; something like that.

78. A counter gate.

A. Yes, sir.

79. Now, then, what does that designation there, "A," intend to represent?

A. The desk.

80. Well, now, will you describe to the jury the kind of desk it was—how long it was, and how high, and how wide it was; if it had anything on top of it, or around it?

A. It was an ordinary desk about that wide, and boarded on three sides.

81. Boarded on three sides, except the side on which it stood?

A. Yes, sir.

82. Now, it was a standing desk, wasn't it—what's called a standing desk?

A. Yes, sir.

38 83. Now, then, around on the top of that standing desk was there anything?

A. A Krailing, and under that railing some glass; I should judge about that high; I couldn't really tell; something like common window-glass.

84. Glass all around on three sides?

A. No, sir; just in front.

85. Not on the east side?

A. No, sir.

86. Now, then, back of that desk what was there—this way here—were there any safes?

A. The treasurer's safe and Wells, Fargo & Company's safe.

87. Which, in that diagram, would you call the treasurer's safe?

A. The one in the corner.

88. And the one towards the front would be Wells-Fargo's safe?

A. Yes, sir.

89. Now, then, where in the inside there did you find your husband lying?

A. Just in here, leaning against this and Wells-Fargo's safe; the space was just large enough for the county safe to swing up.

90. How did this Wells-Fargo's safe open; did it open towards the county safe or towards the desk?

A. It opened this way.

39 91. This door, then, would swing out this way?

A. Yes, sir.

92. Now, then, the space between Wells, Fargo and Company's safe and the county safe—how much do you think that was?

A. It was a little larger than the county safe door?

93. A little more than sufficient for the county safe door to swing?

A. Yes, sir.

94. Was the county safe open or closed?

A. Open.

95. Was this safe here—was that door open or closed?

A. The outer door was open.

96. How much; how far?

A. I don't know.

97. You don't know?

A. No.

98. Now, then, your husband was lying, if I understand it, between Wells-Fargo's safe and the county safe?

A. Yes, sir; leaning against Wells-Fargo's safe.

99. His feet towards the desk; towards this desk marked here "A," and his head up against the safe of Wells, Fargo & Co.; is that correct?

A. Yes, sir.

100. Who first found him?

40 A. I did.

101. Well, did you notice anything—did you notice any injury upon him?

A. Yes, sir.

102. What? What did you notice as to his having received an injury?

A. Well, a place in the bosom of his shirt was marked something like a pistol mark, and something like a triangle; just saw the mark on his shirt; just saw the mark in his shirt.

103. Well, was there any hole in his——

A. Yes, sir.

104. In his breast?

A. I don't know as to that; just saw the mark in his shirt.

105. What?

A. Just saw the mark in his shirt—that's all.

106. A mark of the hole in the shirt?

A. Yes, sir.

107. Yes; you understand that he came to his death by a pistol shot, do you?

A. Yes, sir.

108. By a ball from a pistol or something of the kind that entered his person somewhere in the region of the heart?

A. Yes, sir.

41 109. On the left side of his breast near the region of the heart?

A. Yes, sir.

110. Was he dead when you found him?

A. Yes, sir.

111. He was?

A. Yes, sir.

112. What was his attitude; what was his position on the floor when you first found him?

A. He was lying partly leaning against the desk; the safe; Wells-Fargo's safe.

113 Yes; well, where was his feet?

A. Inside the board of the tall desk.

114. Were they stretched out straight?

A. No; there wasn't room for them to be.

115. Were they crossed, or how?

A. Crossed.

116. One across the other?

A. Yes, sir.

117. Was he drawn up; did his body appear to be drawn up or straight—his legs, for instance, were they drawn up or straight?

A. There was no chance for them to be straight, the place was so small; they were drawn up and crossed.

118. You say the door of the county safe was open?

A. Yes, sir.

42 119. Did you see anything lying around on the floor or about the safe?

A. Yes, sir.

120. What?

A. Money.

121. What kind of money?

A. Twenty dollars and half dollars.

122. Twenty dollars and half-dollar pieces?
A. Yes, sir.
123. Where did he keep the county funds—in the county safe?
A. In the county safe.
124. Did you see any of the funds; any of the money piled up in the safe?
A. No, sir.
125. You did not?
A. No, sir.
126. When did you say this occurred?
A. The morning of the second of January.
127. The morning of the second of January, 1883?
A. Yes, sir.
128. Now, then, did you see any weapon—any pistol—that night?
A. Yes, sir.
129. Where was it, with reference to where your husband was; where was it, with reference to the place your husband was
43 lying? (Diagram shown witness, Ex. "B.") Now, where do you understand the pistol to have been lying?
A. Near this counter.
130. Was that about the place where that "E" is?
A. Somewhere near that counter.
131. It was near that counter somewhere?
A. Yes.
132. Do you know the distance from that counter where the pistol was lying to the inside of the desk?
A. No, sir.
133. You don't know?
A. No, sir.
134. How were your husband's arms or hands when you saw him; when you found him?
A. His right hand was under him; his right arm was kind of under him.
135. And where was his left one?
A. I don't remember.
136. You don't recollect that?
A. No, sir.
137. How was your husband dressed that night, as to being in ball or party costume or having his ordinary clothes on?
A. Dressed in party costume.
138. He was?
A. Yes, sir.
139. What were his spirits that night from the time he came home until he left you at the ball-room?
44 A. Well, as usual.
140. Well?
A. Always lively, pleasant; nothing wrong that I noticed.

Cross-examination:

1. What time did you say it was when you first went for your husband?

A. Between twelve and one.

2. That you went for him the first time?

A. Yes, sir.

3. You answered that at that time he was not in the store?

A. We went to the store and it was dark and we rapped on the door and got no answer.

4. And it was the same way when you went there the second time, was it?

A. Yes, sir.

5. You testified that when you found him he was dead; was he cold?

A. No, sir.

6. He was not cold?

A. No, sir.

7. You testified in regard to his costume; what kind of a coat did he have on; do you know what is called a —; did he have on a swallow-tail coat?

A. No, sir.

8. Did he have what's called a Prince Albert?

A. Yes, sir.

9. That is a coat that's buttoned down in front—a long coat?

A. No; it wasn't buttoned in front; just the first one here was buttoned here; kind of a cut-away soft coat?

10. Yes.

A. It was one that just had one button here.

11. Yes; a black cut-away coat, buttoned with one button?

A. Yes; buttoned with one button.

12. Did you notice when you found him whether the button was buttoned or open?

A. It was open.

13. Did you see the pistol that night?

A. Yes, sir.

14. I wish you would describe the pistol as well as you can.

A. I couldn't; I don't know anything about them.

15. Well, how large, for instance, was it?

A. Oh, I couldn't tell; I just saw it lying over that way and knew it was a pistol; that's all; I couldn't describe anything about it; I never saw it after that.

16. Was it small enough for a man to carry readily in his pocket?

A. No, sir.

17. Too large for that, was it?

A. Yes, sir.

18. Was the barrel of it that long, say?

A. It would be all guess-work; I couldn't tell you; I should judge it was that long.

19. You should judge so?

A. Yes, sir.

20. You say you judge?

A. I should judge so; yes, sir; but I couldn't tell about it.

21. Yes; but from your memory you would say perhaps the barrel might have been that long.

A. Yes, sir.

22. Say (7) seven or eight inches long.

A. I don't know anything about it.

23. Well, I ask you about your recollection as near as you can.

By the COURT: She says she don't know anything about it and that must be the end of it. She has testified two or three times, and you can't make a witness guess when they are under oath; it's too dangerous; and, another thing, the jury cannot rely upon such testimony, mere guess-work.

24. What time was it, as near as you can tell, when he left the ball to go to the store?

A. Somewhere between ten and eleven.

25. You say that the outer door of Wells, Fargo and Company's safe was open?

A. Yes, sir.

47 26. And the inner door closed?

A. Yes, sir.

27. Did you notice whether there was a key on the inner door?

A. No, sir.

28. You say you did not notice?

A. No, sir.

29. The county safe, as I understand it, was entirely open; no door closed there at all?

A. No, sir.

30. Did you notice *did you notice* whether there were marks of powder; whether the powder burnt his clothing?

A. No, sir; I didn't see any.

31. Did you notice whether there was any money under him?

A. I wasn't there when they lifted him up.

32. You saw some pieces of money lying near, did you?

A. Yes, sir.

Redirect examination:

1. Just one question further that I omitted: Were the county books, the treasurer's books, open and lying open upon this desk?

A. Yes, sir.

2. They were?

A. Yes, sir.

3. Do you remember how many of them? *Do you remember how many of them?*

48 A. No, sir.

4. But they were the county books of the county that your husband kept, were they; you know that, do you?

A. I know they were county books.

5. Yes, and they were lying open upon the desk?

A. Yes, sir.

6. One further question: When you went in there was it dark; was the lamp lit?

A. Mr. Kenny lit a candle just as we stepped inside the door.

7. Well, was there any light in the office?

A. No, sir.

8. Was there a lamp in the office?

A. No, sir; there was a lamp hanging on the desk?

9. Did you notice the condition of the wick of the lamp as to whether it had been turned down or not?

A. No, sir.

10. You did not.

A. No, sir.

11. Are you certain about that?

A. Yes, sir.

12. Did any one call attention at that time to the condition of the lamp about the wick having been turned up as ready to burn?

A. Not that time, but the next morning.

13. The next morning?

49 A. Yes, sir.

14. You saw it at that time, did you?

A. No, sir.

15. You did not?

A. No, sir.

Recross-examination:

1. Did you notice the oil in the lamp or any other indications about the lamp at all?

A. No, sir.

The plaintiff here rests her case.

The defendant offers in evidence and reads the deposition of Thomas Kenny to the court and jury as follows:

My name is Thomas Kenny; age, 32 years; occupation a miner; residence, Hamilton, White Pine county, State of Nevada. I was acquainted with George P. McConkey, late treasurer of White Pine county, Nevada. I knew him in said county since 1876 and up to the time of his death; he died on the morning of January 2, 1883. On that morning and prior to finding McConkey's body I was attending a ball in Hamilton about half past 11 o'clock p. m., and prior to going to supper Mrs. McConkey asked me if I
50 had seen George, meaning her husband. I said no, and then asked he, where he was. She said he had gone to the store to fix up some books and was to come back to take her to supper, and then I left ball-room and went to supper, and after I had my supper I met Mrs. McConkey in the parlor of Mrs. Nelson Bush's restaurant, and then she asked me again if I had seen George. I told her no. Then she, Mrs. McConkey, asked me if I would go to the store with her and Miss Lizzie Horl and Ira McKnight to see if George was there. I told her yes, I would go, and the four of us started and went up to the store of Mathewson Brothers, where Mc-

Conkey was usually employed, in the express office; we knocked on the outside of the iron doors, which were all closed; we received no answer; then we left there and all went back to the ball-room and remained there until about half past three a. m., when she, Mrs. McConkey, again asked me if I would go with her to J. B. Matthewson's, one of the firm of Matthewson Brothers, to get the key of the store to see if George P. McConkey had been in the store; we went to Matthewson's residence and Mrs. McConkey woke Matthew-
51 son up and asked him for the key of the store, and told him that McConkey had not returned since before supper and she wanted to see if he was in the store or not. Matthewson told her to wait a moment, until he dressed, and then he would go down with her and open the door for her. She said to Matthewson: "Give me the key and maybe Tommy," meaning the witness, "can open the door." She took the key and we went down to the store and went to the lower door of the grocery department and opened the door with the key. I said to Mrs. McConkey: "George is not here; if he was, there would be a light here." She insisted on going in; then I went into the store and struck a match and lit a candle, and she came in and we went through the grocery department into Wells-Fargo's office; when we got into Wells-Fargo's office I said to Mrs. McConkey: "Here is George asleep." I found him lying between the two safes, the safe of Wells, Fargo and Company and the safe of White Pine county, and then Mrs. McConkey sprang by me and threw herself on McConkey and said: "Wake up, George." I then put my hand on McConkey's hand and found it cold, and said: "Mrs. McConkey,
52 he is dead; somebody has killed him for his money, or else he has killed himself." I then turned around and saw a pistol laying on the floor near a counter, about five or six feet away from the body; I then ran out and met J. B. Matthewson at the door of the store, coming in. I cried out to Matthewson that "McConkey is dead." Then Matthewson and I went back to where the body laid. I recognize the diagram presented to me, marked "Diagram Matthewson Bros.' Store," as correct. The body laid between the two safes as before stated. The door of the White Pine county safe was open towards the safe of Wells, Fargo and Company. The bottom of the door was about eighteen inches from the floor. The head of the deceased was under the door, face upwards, the body lying on its back; the feet extended towards the desk, marked A in diagram, in a constrained position. I believe both of his hands were across his breast. The body was at the point marked "B" in the diagram. The desk A is about two and a half feet from the safe of Wells, Fargo & Company. The safe of Wells, Fargo and Company is about two and one-fourth feet in depth. There
53 was some large account books on the desk A, open. The pistol was lying on the floor a few inches from the counter, marked C on the diagram. I saw some coin lying on the outer edge of the safe of White Pine county. The deceased was in full ball dress, the same as I saw him at the ball. He had his coat on when I found him. I did not examine the body or clothing at that time. I saw the body afterwards with the shirt on. I saw the hole

in the breast in the shirt where the bullet entered; I did not notice whether it was powder-burnt or not. I am a frequenter of Matthewsons Brother's store, and acquainted with the interior. There was no sign of a conflict that I noticed, or of voilence, except finding McConkey dead. The furniture of the office was apparently in its usual order. I saw McConkey before he left the ball-room; he appeared to me to be in his usual good spirits.

(Signed) THOMAS KENNY.

The defendant also offers in evidence and reads to the court and jury the deposition of Herman Hoppe as follows:

My name is Herman Hoppe; age, 30 years; occupation, merchant; residence, Hamilton, White Pine county, State of
54 Nevada; I was acquainted with George P. McConkey, late treasurer of White Pine county, Nevada, prior to his death; he was found dead on the 2nd day of January, A. D. 1883, about 3 or 4 o'clock a. m., in Wells, Fargo and Company's express office, in the store of Matthewson Bros., in the town of Hamilton, in said county of White Pine; at the time that I heard of his death I was at the ball; Mr. Wm. Hayes, the coroner, told me to come along and see him, George P. McConkey; we went to the store of Matthewson Bros.; went in and found the body of George McConkey in front of the safe of White Pine county; the body was sitting on the floor, half reclining against the open door of the safe of White Pine Co.; I recognize the diagram marked "Matthewson Bros.' Store," presented to me, as correct; the body was lying on the floor, between desk "A," as marked on the diagram, and the two safes at the point marked "B;" the body was lying partly on its back and partly in a sitting position, as stated before, the feet extending towards the desk "A;" the body was fully dressed as I had previously seen him at the ball; I did not then examine the clothing, but did afterwards; McConkey was shot in the left
55 breast; afterwards, about 6 or 7 o'clock a. m., when McConkey had been laid upon the counter, marked "C" in the diagram, I examined his clothing and the hole where the bullet entered the vest; the vest was powder-burnt, just as if the pistol had been fired close to his vest and was powder-burnt about three or four inches in diameter. There was no hole in the coat corresponding to the hole in the vest, but I think the coat was a little powder-burnt on the edge of the lapel of the coat and about opposite the hole in the vest; when I first went and saw McConkey's body lying there I saw some large account books lying on the desk "A," in the diagram; I saw money lying on the floor with the body and between it and White Pine county safe. There was about $20 or $30 in gold and silver coin; afterwards I found a $20.00 gold piece when I was watching the safe the night afterwards. I have been for a long time acquainted with the interior of Matthewson Bros.' store; the first time I went in and saw the body everything in the store appeared to be in its usual order; there was nothing to indicate that there had been a struggle; the body appeared to be as if it had sunk down and fallen backwards against the
56 door of the safe. I had been sent for, and was there in my

capacity of constable, and made close observations of everything When I first went into the store I saw C. A. Matthewson at the door, and then I went in to where the body was, and I saw Dr. H. S. Herreck, Ed. Raum, J. B. Matthewson, and Mrs. McConkey; the desk "A," marked in the diagram, is a standing desk, the top of which is about five feet from the floor, and at which the deceased was standing when shot.

(Signed) H. HOPPE.

The defendant also offers in evidence and reads to the court and jury the deposition of C. A. Matthewson, omitting from such reading the portions of said deposition which the court rules out upon the objection of plaintiff, the portions read being as follows:

"My name is C. A. Mathewson; age, 30 years; occupation, merchant; residence, Hamilton, White Pine county, State of Nevada; I am one of the firm of Mathewson Brothers, which consists of J. B. Mathewson and C. A. Mathewson; is the same firm which existed on the 2nd day of January, A. D. 1883. I was acquainted
57 with George P. McConkey during his lifetime; he was in our employ since October 19, 1879, up to his death. Everets and Co., from whom we purchased the business, were the agents of Wells, Fargo & Co. Express; McConkey was paid by us as sub-agent of Wells, Fargo and Co. for Everts and Co.; he died on the morning of January 2, 1883; I last saw him alive in the store about five o'clock p. m. on January 1, 1883; I next saw him about half past 3 o'clock a. m. of January 2, 1883, at the express office in our store, dead.

"I recognize the diagram presented to me, marked 'Diagram of Mathewson Brothers' Store,' as correct; the distances marked on the diagram I should judge to be correct; he was then reclining against the safe of Wells, Fargo and Co., where he had been lifted up by my brother Jerome; his feet had not been disturbed, but were in a very cramped position where he had fallen when shot; the body rested on the floor between the desk "A" and the safe of Wells, Fargo & Comp'y as marked on the diagram, the head against the safe and the feet towards the desk; the body was dressed in a dark-colored suit, with the coat on; the door of the county safe
58 was open towards the safe of Wells, Fargo and Co. as marked on the diagram; the outside door of Wells, Fargo and Company's safe was open, and the inside door of the safe was closed, with the key in the door and the combination on. I saw coin laying on the floor, and on the side of the county safe the coin lying on the floor was between the body and the county safe; there was no coin in sight in the county safe, as I remember, at that time. I examined the body at that time; his wife pointed out the wound to me; the wound was situated a little below the left nipple; it was a gun shot wound; the bullet had penetrated the vest and underclothing of the deceased; I examined the vest and saw that it was powder-burned. The inside of the vest was also powder-burnt; the shirt and undershirt also discolored and blackened, as well as the skin of the deceased, by the smoke; there was no hole

in the coat opposite to the hole in the vest, nor was the coat powder-burnt, because we all of us examined it carefully; I mean by we Ed. Raum, then ex-sheriff of the county; my brother, J. B. Mathewson; Wm. Hayes, coroner, and the coroner's jury. He, McConkey, was the owner, as I have ascertained since his death, of 5,300 shares of Star mining stock, a corporation doing business at Cherry
59 Creek, White Pine county, Nevada. He had been carrying that stock some time before his death. This stock had been regularly assessed for a number of years, and never declared a dividend; it was assessed every 60 days either 10 cents or 20 cents per share. He was also carrying other stocks for himself and others in large amounts, some of which were regularly assessed. I am thoroughly acquainted with the interior of the store of Mathewson Brothers, and on the morning of the finding of the body of McConkey the furniture of the office of Wells, Fargo and Company was undisturbed and nothing to indicate violence. After I had examined the body I stepped over near the counter marked "C" in diagram, and in doing so my foot came in contact with a pistol lying on the floor at about *about* the point E marked on the diagram, and I should judge about 6 feet from the body. I pointed out the pistol to my brother, J. B. Mathewson, remarking, 'There is the thing that killed him,' pointing to the pistol. I think Ed. Raum, ex-sheriff, picked it up and handed it to J. B. Mathewson, who put it in our safe. I recognize the pistol as the one which had laid upon our desk for several months previous, at the point marked D on our diagram. The pistol had been taken
60 from behind the desk at the point marked 'F' on the diagram, as could be plainly seen by marks in the dust. It was a remodeled Colt's navy pistol, 38 caliber, which had been loaded by me in the February previous. It was the same pistol that was exhibited to the coroner's jury in the same condition in which it was picked up from the floor—one chamber empty, as if it had been recently fired. I saw the ball that was extracted from the body by the physicians, and am satisfied that it was a 38-caliber ball and the same which was fired from that pistol. The pistol was shown also to the physicians and district attorney. When I first saw his body two county treasurer's books were lying open on his desk, A, as marked in the diagram, and remained so for some time afterwards. The safe of Wells, Fargo and Company was examined and everything found that should have been, and the contents undisturbed. McConkey had been county treasurer for four years previous, and had kept the county safe, books, and money in Wells, Fargo and Co.'s express office in our store. His term of office as county treasurer of White Pine county expired on December 31, A. D. 1882.

"(Signed) C. A. MATHEWSON."

61 The defendant also offers in evidence and reads to the court and jury the deposition of Samuel Leddle, omitting the por-

tions ruled out by the court upon the plaintiff's objection, the portions read being as follows:

"My name is Samuel Leddle, age, 42 years; occupation, treasurer of White Pine county, Nevada. I have been treasurer of said county since January 1, 1883. I succeeded George P. McConkey, who had been county treasurer for the four years preceeding. McConkey kept the county safe and books at Matthewson Bros.' store, where they were at the time of his death. He was found dead in said store about 3 o'clock in the morning of January 2, 1883. I had been well acquainted with McConkey prior to that time. His term of office as Co. treasurer expired on Dec. 31, A. D. 1882. McConkey was to have turned over to me as Co. treasurer aforesaid the county money, safe, and books on the day on which he was found dead. It had been so arranged by us the day before when he (McConkey) offered to turn over the combination of the county safe to me, which I declined until the safe and county funds were turned over to me at the court-house. The safe
62 and county funds, consisting of the sum of $13,764.80, and the treasurer's books were turned over to me as Co. treasurer by the county commissioners of White Pine county about January 9, 1883, at the time I received the county treasurer's books. I examined them carefully to ascertain the condition of the several accounts. None of the accounts in the ledger or journal were balanced. They were subsequently balanced by C. F. Horn, an expert book-keeper employed by the county commissioners for that purpose, who delivered the books to me. I saw the body of McConkey about 3 o'clock a. m. the day of his death. I recognize the diagram shown me, marked Diagram of Mathewsons Bros.' Store, as correct. The body when I saw it was laying on top of counter marked C in diagram. The body was dressed in coat, vest, and pants. I did not examine the body at that time or the clothing. The next time I saw the body was at the time it was laid out for the purpose of holding an autopsy. It then had on a shirt, undershirt, and pants. I noticed a hole through the shirt on the left breast. The edges of the hole was
63 slightly discolored and blackened as if made by powder or powder smoke. I subsequently saw a hole in the body as if made by a pistol shot opposite of the hole made in the shirt. The orifice of the hole in the body was also somewhat discolored and blackened.

(Signed) SAMUEL LIDDLE.

The defendant also offers in evidence and reads to the court and jury the deposition of A. B. Treece, omitting the portions ruled out by the court upon plaintiff's objection, the portions so read being as follows:

"My name is A. B. Treece; age, 48 years; occupation, district attorney of White Pine county, Nevada. On the 2 day of January, A. D. 1883, I was district attorney of White Pine county. I was well acquainted with George P. McConkey, late treasurer of White Pine county. He was found dead in the store of Mathewson Bros., in Hamilton, in said county, about 3 a. m. on said last-mentioned date.

I first saw him dead lying on the counter in Mathewson Bros.' store. I recognize the diagram shown me, marked 'Diagram of Mathewson Bros.' Store,' as correct. The body was lying on
64 the counter marked C in the diagram. He had on his regular clothing, including coat. I did not examine the body at that time, but saw it after it was stripped at the time of the autopsy. A gun shot or pistol shot had entered the body near the left nipple. The orifice around the hole looked as if it was powder-burnt and was blackened and discolored. I also examined the vest and shirts of the deceased. I found holes in them over the left nipple, where the ball had entered the body. They were also blackened and burnt, as if the pistol had been discharged close to them. There was no pistol ball penetrated the coat. I saw the pistol with which he is said to have been shot. It was an old-fashioned Colt's navy cap pistol. I saw the pistol the same morning. There was one chamber discharged. It looked as if it had recently been discharged. The hole in the body was such as would have been made by a ball from such a pistol fired at close range. I saw the ball after it was extracted from the body by Doctors Herrick and Willard. I saw it weighed, and it corresponded in size and weight with the bullets in the pistol above described. I think C. A. Mathewson
65 showed me the pistol at the time and remarked, 'Here is — damn thing that done the work.' I think it was the same pistol that I had before seen on desk 'D' in grocery department marked on diagram. It corresponded in size and general appearance.

"(Signed) A. B. TREECE."

The defendant also offers in evidence and reads to the court and jury the deposition of J. H. Lockwood, omitting the portions ruled out by the court upon plaintiff's objection, the portions so read being as follows:

"My name is J. H. Lockwood; age, 47 years; occupation, saddler; residence, Hamilton, White Pine county, Nevada. I am now and have been for about four years last past chairman of the board of county commissioners of White Pine county, Nevada. I knew George P. McConkey, late treasurer of White Pine Co. His term of office as treasurer of White Pine county expired on the 31st day of January, A. D. 1882. It is the duty made incumbent by law upon such board of county commissioners to count the county funds
66 quarterly. In pursuance of such duty the board of county commissioners of said county counted the funds belonging to the county in the possession of the treasurer, George P. McConkey, on the first Monday of October, A. D. 1882. The funds were found to be correct. The next time we counted the funds was on the 2nd day of January, A. D. 1883, after McConkey's death. We counted it at Mathewson Bros.' store, in Hamilton, where the county safe and county treasurer's books had been kept by McConkey. We again counted the funds on the 9th day of January, 1883, and found all the funds as reported by the county auditor and expert book-

keeper employed by the board of county commissioners, except the sum of $11,092.33. We turned over to the incoming county treasurer, Samuel Liddle, the sum of $13.764.80 county funds found by us. (The rest of the deposition is omitted, having been ruled out by the court.)

"(Signed) J. H. LOCKWOOD."

The defendant offers in evidence and reads to the court and jury the deposition of S. S. Wooden, omitting the portions ruled out by the court upon plaintiff's objection, the portions so read being as follows:

67 My name is S. S. Wooden; age, 65; my occupation, deputy recorder White Pine county, State of Nevada; residence, Hamilton. I was acquainted with George P. McConkey, late treasurer of White Pine county, before his death. I was deputy recorder and auditor at the time of his death, and as such was well acquainted with the financial affairs and condition of the county. After the death of McConkey I had occasion to examine his books as county treasurer. I examined them with C. F. Horn, an expert book-keeper employed by the county commissioners for that purpose. We found that there should have been in the possession of McConkey, as county treasurer, the sum of $24,857.13.

(The rest of the deposition is now omitted, having been ruled out by the court.)

(Signed) S. S. WOODEN.

The defendant also offers in evidence and reads to the court and jury the deposition of Dr. H. S. Herrick as follows:

My name is H. S. Herrick; age, 65; residence, Hamilton, White Pine —, State of Nevada; am a regular practicing physician since 1839. I was well acquainted with George P. McConkey
68 prior to his death. On the 2nd day of January, A. D. 1883, between 2 and 3 o'clock a. m. of that day, I was called to see the body of George P. McConkey. I found the body at the store of Mathewson Bros., in the town aforesaid, of Hamilton. The body was lying on the floor, back of his writing-desk, between two safes. I recognize the diagram shown to me, marked "Diagram Mathewson Bros.' Store," as correct. The head was lying between the safe of Wells, Fargo and Co. and the safe of White Pine Co., as marked on diagram, and the feet extending towards desk "A," as marked on said "diagram;" face upwards at the point marked "B" *marked* on diagram. The body was fully clothed, with coat on. I examined McConkey when I first came in and found him dead. I found that he had been shot in the left breast. The body was in the same position as first discovered. When I saw it first his arms laid by his side, his right foot was across his left leg just below the knee, he was flat on his back, and his feet slightly under the desk "A." The county safe door was wide open. The door of Wells, Fargo & Co. safe was closed and the key in the lock and the door locked. There

was coin lying on the floor, between the body and the
69 county safe. I saw some of the county treasurer's books open on the desk "A." I am acquainted with Mathewson Bros.' store and express office. I observed no disorder whatever or any indications of a struggle or violence except finding the body of McConkey. When I first went into the store I found Edward Raum, Thomas Kenny, J. B. Mathewson, C. A. Mathewson, and Mrs. McConkey. The coroner's jury was called about 10 o'clock a. m. of the same day. I held a post-mortem examination of the body of McConkey, assisted by E. X. Willard. Willard is not now in the State. I found he was wounded by a pistol ball, which had entered the left side of breast bone, passing between the third and fourth ribs and through both valves of the heart, and passing entirely through the backbone and lodging in the muscles of the right side of the back, as much as four or five inches lower down than where the ball entered. The ball was not diverted in its course, but went straight through the body from the point where it entered to the (point) where it lodged, causing instant death. There was no other wounds on the body. I saw the pistol that was said to have
70 done the shooting lying on the floor when I first went in in the morning, near and almost against counter "C," at the point marked "E" in diagram and about five or six feet from the body. The pistol I saw then was a Colt's navy pistol. I did not at that time examine it. At the time of holding the inquest I then examined the pistol. One chamber was empty. The bullet that I extracted from the body corresponded in calibre, appearance, and weight with the bullets in the pistol found on the floor. The bullet was somewhat flattened in passing through the backbone. The ball in entering the body passed through the vest, outside shirt, and undershirt. There was no hole in the coat corresponding and opposite to the hole in the vest. I did not notice as to powder burns. The pistol was handed me by the foreman of the coroner's jury.

Cross-examined:

Interrogatory 1st. If you state that you made or assisted to make a post-mortem examination of the body of C. P. McConkey, please state if you found any wound upon his person, where it was located, how and with what made, and the extent of the wound; if any ball was found where the same was found.

71 Answer. I found a wound in the left breast extending through the body to the muscles of the right side of the backbone, made by a pistol ball which I found lodged in said muscles, all of which I have stated particularly above.

(Signed) H. S. HERRICK.

The defendant offers in evidence and reads to the court and jury the deposition of C. A. Mathewson, recalled, as follows:

The pistol I have referred to in my former testimony, after it was picked up from the floor, as stated therein, and put in the safe, was

not again touched or handled by any one until it was taken from the safe and given to the coroner's jury the same morning as evidence.

(Signed) C. A. MATHEWSON.

The defendant also offers in evidence and reads to the court and jury a portion of the deposition of J. B. Mathewson, as follows:

My name is J. B. Mathewson; age, 50 years; occupation, merchant, residing in Hamilton, White Pine county, State of Nevada; the firm name is Mathewson Bros., and have been
72 in existence five years; I was acquainted with George P. McConkey for three years before his death. When I first became acquainted with McConkey he was clerk for Everets and Co., whom we succeeded in business, and at time he was acting as sub-agent for Everts and Co., agents of Wells, Fargo & Co., and also at that time county treasurer. McConkey at the time of his death was about 38 years old; his general disposition and habits were good pecuniarily; the treasurer's office of White Pine county were kept in our store for about three years prior to his death. The diagram of Mathewson Bros.' store is correct, presented to me and marked "Diagram of Mathewson Bros.' Store." The distances marked in diagram are approximately correct. I was at my house on the morning of the 2nd day of January, A. D. 1883; I saw Mrs. McConkey early on that morning; she came to my house and asked me for the key of the store about 3 o'clock a. m.; I gave her the key, and as I dressed I went down to the store alone; I entered the east or lower door, which was open-, as I suppose, by Mrs. McConkey and Tommy Kenny; I met Tommy
73 Kenny at the door as I stepped in. I found McConkey lying between the two safes, as in per diagram; the body was lying between the two safes on its back, face up, the feet partially under the desk marked "A" in diagram, the limbs in a constrained position. At that time I saw a pistol lying on the floor at a point marked "E" on the diagram. Mrs. McConkey pointed it out to me first I saw of it, but I think it was given to Sheriff Raum; I do not know where it was placed; I did not examine it at that time, but did afterwards; there was one chamber empty; I do not know in whose possession the pistol was until it was given to the coroner's jury. I do not know as it was handled by any one prior to the time it was picked up and given to the coroner's jury in evidence. The pistol picked up was the same pistol given to the coroner's jury. I recognized the pistol as the one kept on desk D, marked on diagram, where it had been kept for months past. It looked as though the pistol had been recently removed. The coating of dust where the pistol lay showed finger marks. The pistol was kept on
74 desk marked D on diagram at a point marked F on diagram. I recognize the pistol found on the floor and pointed out to me by my brother, C. A. Mathewson, and subsequently shown to the coroner's jury as the same pistol. I do not know if the pistol was in the same condition when shown to the coroner's jury as when

picked up from the floor. I was present at the post-mortem examination. I saw the bullet wound. I saw the bullet after it was extracted; it corresponded in size and appearance with the bullets in the pistol. I examined the pistol and found one chamber empty at the time it was presented to the coroner's jury as evidence. The pistol was about five or six feet from the body when discovered. The pistol was a naval size Colt's pistol. The first time I examined the wound was at the coroner's inquest. The wound was in the left breast, below the nipple; it appeared to be a hole made by a pistol ball. I did not see where the ball lodged. The ex-coroner, Wm. Hayes, held the inquest. The physicians were Dr-. H. S. Herrick and E. X. Willard. Yes; we agreed as to cause of death; it was caused by the wound made by the pistol ball. There
75 was only one wound made on the body. I examined the clothing, and where the ball entered they were somewhat powder-burned; the ball did not penetrate any other clothing except the vest and underclothing. I do not know whether the wound was powder-burned or not; I do not think it was; it was blackened or discolored a little when I first went into the store in the morning. When I discovered the body the county safe door was open and Wells, Fargo & Co.'s safe outside door was closed and locked; the inside safe door of the county safe was open and some coin in sight in the safe and some coin scattered on the floor near the body and some partially under the body of McConkey, who lay between the two safes, as before described.

The remainder of this deposition was offered and read in evidence by plaintiff, and the same will be found in said testimony, page — of this transcript.

EDWIN MOORE, called as a witness on behalf of defendant, testified as follows:

Direct examination:

1. What is your name?
A. Edwin Moore.
76 2. What is your business?
A. A policeman.
3. Been recently chosen city marshal, I believe?
A. Yes, sir.
4. Have you lately made some experiments with a pistol in order to show the distance at which a powder-burn may be shown?
A. I have.
5. What is that you have in your hands?

Witness produces a piece of board with pieces of clothes on same, with pistol holes through same.

The court inquires of counsel for defen't what he expects to prove by this witness and as to what experiments he, the said witness, made.

Counsel for def't states that he offers to show by this witness, as the result of experiments made by him, that, in order to have the

effect of powder-burn upon the clothing and body of McConkey, which is shown to have been upon his clothing and body by the testimony in this case, the pistol must have been held in very close proximity, almost in close contact with the body.

The court sustains the objection and rules the testimony out (the plaintiff's objection being incompetent, irrelevant, and
77 immaterial, and getting up a false issue), it appearing that this witness is not an expert, and that the plaintiff was not present at the time the said experiments were made or had any notice of same, and the def't duly excepts.

The court also states that this matter upon which this witness is called is a matter of common observation and common experience among men.

JOHN HARTIG, called as a witness on behalf of defendant, testified as follows:

Direct examination:

1. Where do you live?
A. Dubuque, Iowa.
2. What is your business?
A. A gunsmith.
3. How long have you been a gunsmith?
A. About thirty years.
4. Do you know what a navy pistol is?
A. Yes, sir.
5. How big is it?
A. A navy pistol is thirty caliber.
6. Thirty caliber?
A. Yes, sir; some have six and some have eight inch barrels.
7. Look at the pistol you have in your hands and state
78 whether or not that's what is known as a navy pistol in size.
A. Yes, sir; I should call that a navy revolver.

Cross-examination:

1. What is the caliber?
A. Sir?
2. Sir, what's the caliber?
A. What's the caliber of the pistol?
3. Yes, sir. That's the question I asked.
A. I should call that a forty caliber.
4. Is it 40 or 44?
A. It's not a 44. To the best of my knowledge, it's a 40.
5. Just explain to the jury, if you know, the difference between that and a 38 caliber.
A. A 38. The way a pistol is measured is by an inch divided into hundredth parts; a 38-caliber one means 38 hundredths of an inch consequently, and a 40 caliber means $\frac{40}{100}$ of an inch; a 40 would be two-hundredths larger than a 38.
6. What is the length of a barrel of a 38 caliber?

A. Well, as I stated before, some are six, some are eight inches long.

7. Of a 38 caliber?

A. Yes, sir.

8. Then they are not all of the same length of barrel, are they?

A. They are not all of the same length of barrel; no, sir.

79 9. Have you any, or have you had any, experience with what is known as a remodeled Colt's navy pistol?

A. Remod-led?

10. Yes, sir.

A. Do you mean from a powder-and-ball into a cartridge?

11. No, sir; I am not meaning anything that would — implied in that question, sir. I mean a remod-led navy Colt's revolver.

A. Well, all I know about the remod-led is that the factory has changed a lot of their pistols from a powder-and-ball into a cartridge revolver.

12. In that change has the barrel in any way been interfered with—shortened?

A. I think not.

13. You think not?

A. No, sir.

14. Have you any personal knowledge on that subject?

A. Well, all those that I've ever seen that has been remodeled has not been changed in the length of the barrel.

15. Well, that wouldn't be a remod-led pistol. Just simply explain to the jury how much it was remod-led, so far as your experience goes and your knowledge.

A. So far as a remod-led — is concerned the chamber and the cylinder was remodeled.

80 By counsel for defendant to witness: You mean this part here?

A. Yes, sir.

By counsel for def't to witness: You mean that here?

A. That; yes, sir.

16. Well, how do you mean; a new one put in entirely?

A. A new cylinder has been put in entirely.

17. Yes, and the former thrown away.

A. Yes.

18. In doing that wouldn't they necessarily have to change the size of the barrel if they enlarged the ball?

A. No; a new cylinder was made to correspond with the barrel, I think.

19. I think it was made to correspond with it.

A. I think so.

20. Well, then, I understand you to say that you have no personal knowledge of the length of the barrel or whether it was remod-led further than simply in the chambers?

A. Well, to the best of my knowledge, no changes have been made except the cylinder.

21. Yes; now I understand you to say that, of course. You

81 have no knowledge of the pistol that you used except by the

description that was given by the witnesses that it was 38 caliber, have you?

A. Well, as I stated, I understood it was a 38 caliber navy revolver that was there.

22. And they are not uniform in size at all, except as to caliber and the length of barrel? They are not uniform, I understand you to say?

A. Some are six and some are eight inch barrels, I've stated.

23. I would like to get your idea of a remod-led revolver prominent to the jury.

A. Well, my idea of a remodeled revolver is that the factory took a lot of them —

24. Now, that one, is that a remodeled one or not (referring to the pistol first shown witness)?

A. No; that't an original powder-and-ball revolver.

25. Very well. Now, if it had been changed it would be a cartridge instead of a ball-and-cartridge, wouldn't it?

A. It would be a cartridge instead of a ball and loose am-unition.

26. Yes; then there would be no caps on the remodeled, as you understand it, would there?

A. No, sir.

82 27. Then, if it was not such a one, and as a matter of fact caps were used on it, it wouldn't be, in your idea, a remodeled — would it?

A. No, sir; it wouldn't be a remodeled revolver in my idea.

27. Yes, exactly. Now, as to the actual fact as to the condition of the revolver that is alleged to have been used in this transaction, you have no personal knowledge? You have never seen the pistol in controversy, have you?

A. No, sir.

28. The one that's alleged to have been used, that this man was shot with?

A. Never seen it; no, sir.

29. No, sir; nor any of them, you say?

A. No, sir.

Redirect examination:

1. How long is the barrel of that pistol?

A. That barrel is eight inches.

Recross-examination:

1. Where did it come from; did this come out of your establishment; did these gentlemen get it from you?

A. Yes; they borrowed it from me.

Mrs. SADIE MCCONKEY, recalled by def't:

Direct examination:

83 1. Now, I want to call your attention again to this diagram and ask you which door you call the lower door?

Diagram marked "B" shown to witness.

A. This one.

2. That one there?

A. Yes, sir.

3. That's the one you went in at, is it?

A. Yes, sir; that's the one we went in at.

4. Have you positive—can you state positively—the directions, the points of the compass here; are you certain about the points of the compass—which is east and west and north and south?

A. About here on this is east and there west.

5. Yes; you would put here as east and about there west?

A. Yes, sir; about as near as I can judge.

The defendant here rests his case.

Counsel for plaintiff offers to read from the deposition of J. B. Mathewson the portions omitted by counsel for defen't.

Defen't objects to any portion of said deposition being read unless the whole is read, and objects to such portions as are marked
84 ruled out by court as incompetent irrelevant, and immaterial.

Objections overruled; the defen't duly excepts.

Counsel for pl'ff then reads as follows from the deposition of J. B. Mathewson, resumed:

J. B. Mathewson'- testimony resumed, and says: I found coin partially under the body and arms, and when I went to lift McConkey up from where he was lying I put my hand under his shoulder and it came in contact with coin. Wells, Fargo and Co.'s safe and contents were intact, so far as I know. The express office was not disturbed or in confusion to any extent when I first discovered the body, except the money lying around on the floor. It was about three o'clock a. m., on January 2nd, 1883, when I first discovered the body—present, Mrs. McConkey and Tommy Kenny. I entered the store at the east or lower door. When I first entered the store at the east or lower door, when I first entered the store, and soon afterwards, I made an examination of the condition of the doors, and found the east door entering into Wells, Fargo & Co.'s office unlocked, but closed—I mean
85 the iron shutter-door, and also found the inside sash door also unlocked and opened. There's only two entrances to the store by keys; the other two doors not mentioned have bars on the inside and were closed and at that time barred. I kept one key and McConkey the other key of the store. I had one key that night, and I supposee that McConkey had the other. The relations of McConkey and wife were very harmonious and happy, as far as I know, up to his death, and always had been; he never told me that he had lost any money in stocks. I do not know and he never told me that he had lost on Star mining stocks, and I do not know that he was a heavy or any loser in stocks a short time previous to his death. I am not aware that he lost anything on Star mining stocks. I was not familiar with McConkey's stock business and cannot say whether he was carrying non-dividend-paying stock for others or not. McConkey was not a careless loaner of money, to my knowledge and

belief; on the contrary, I think he was very careful; he did not carry any stock, to my knowledge, through Wells, Fargo & Com-
86 pany. McConkey belonged to the Masonic order, and I understand that he was insured by that order for about $8,000 at the time of his death. I do not know at the last counting of the county funds in October, 1882, by the county commissioners that E. W. Robinson or any other person furnished a part or any of the money exhibited to the county commissioners as part of the county money, and I do not know that any portion of the same was in greenbacks. McConkey never told me or admitted to me or any one else in my presence, while he was county treasurer, that he was behind or any loser of county money, and did not tell me that he was any loser in the campaign of 1882. At the time that Mrs. McConkey came to my house with Tommy Kenny for the key of the store she said that McConkey left the ball-room about eleven o'clock from the dance to go to the store to do some work on the county books prior to turning the same over on the next morning to his successor, and at the time of the discovery of McConkey's body she, Mrs. McConkey, said "Oh, my God, George is dead!" and she did not say that she had any reason to think that anything was wrong; she did not say that "George has left me well
87 provided for," or anything to that effect, or anything to lead any one to believe she knew or had any reason to believe that she knew what had happened to McConkey. After I first saw the body of McConkey I examined the premises, as previously stated, and found the door of the express office unlocked, but found no other persons in the store or office except Mrs. McConkey, Tommy Kenny, and others who had come into the store, and I examined all means of ingress and egress, and found no other way of entrance or exit except as stated. I did not examine snow or tracks in front of store. I did not track McConkey's footsteps from the store upon the side hill near my house or stable.

Cross-examination.

I cannot say where the pistol was on the day or night that the body was found. I do not know whether he had a pistol or not; and, if so, I do not know where it was found or its condition.

Plaintiff offers to read in evidence the certified copy of the testimony, under seal, of Eugene W. Robinson, taken before the coroner's jury at the inquest on the body of George P. McConkey, at
88 Hamilton, Nevada.

To which def't objects. Objection sustained, and the pl'ff duly excepts.

Mrs. SADIE P. MCCONKEY recalled by pl'ff.

Direct examination:

1. I understand you to say on your examination before, when you were examined, that you did not make any examination of the pistol, although you saw it—the pistol that was found there on the floor; is that correct?

A. Yes, sir.

2. Now, from your recollection of it and observation of it, was it as large a pistol as that?

Def't objects because on the direct examination counsel for def't tried to prove by this witness the length of said pistol, and the witness refused to answer, and the court refused to allow def't to go on and ask the witness what her recollection was on that subject, and that counsel for def't measured upon his hand and asked the witness if, according to her recollection and memory, the pistol was of such a length, and the witness stated that she could not remember
89 anything about it, as to whether it was that long or not. Now counsel for pl'ff asks the witness whether it would be as long as that pistol on the table there. Objection overruled, and the def't duly excepts.

Question No. 2 changed to the following: What do you say as to your recollection whether or not the pistol you saw there was as long and apparently as large as that or not (referring to the pistol produced by the witness Hartig)?

A. It didn't look to me as long as that, but still I have no personal knowledge of that; I never handled the pistol.

3. No; but what you did see of it, it didn't look as long as this one, did it?

Def't objects.

By the COURT: That will do, I think, when she says that it is merely guess-work.

By the WITNESS: It would be all guess-work; I don't know anything at all about it.

4. Well, if it would be all guess-work, I don't want any guess-work. What were the habits of your husband as to being at home evenings after his work was done or otherwise?

90 Def't objects for the reason that this is a part of pl'ff's main case, and that the def't has not touched upon it at all in their testimony, and, further, it is immaterial.

Objection overruled, and the def't duly excepts.

A. Well, he was always at home, except lodge nights.

5½. Always at home except lodge nights. I understood you to say that you had two children?

A. I have.

5. Are they boys or girls?

Def't objects as immaterial. Overruled, and the def't duly excepts.

A. The oldest is a girl and the youngest is a boy.

6. How old are your children?

A. The oldest is eight and the youngest a little over six.

7. When your husband died did you have any money in the bank?

A. Yes, sir.

8. How much?

Def't objects to the form of the question, as it don't show the witness' knowledge.

By the COURT: Well, of course she cannot testify without knowledge of what she is testifying about. Perhaps a better way would be to ask the witness what knowledge she has of her husband's having money on hand, and how much.

91 9. How much money do you know of your husband having in the bank?

Def't objects that pl'ff's question ought to be whether the witness knows or not, and her means of knowledge.

By the COURT: Unless it is a legal objection the court cannot direct counsel as to their mode of examination, except so far as they ask leading questions; and, besides, you (coun. for def't) can cross-examine the witness as to her means of knowledge.

10. How much do you know of your husband having in bank at the time that he was found dead?

Def't objects to the question for the reason the proper foundation has not been laid, and that the question is leading. Overruled, and the def't duly excepts.

A. Something over five thousand dollars in the bank of San Francisco.

11. Well.

A. Some in Eureka; I don't know how much, but very nearly, I think, a thousand; and a thousand dollars in Matthewson — Company's safe.

12. Matthewson — Company's safe—the proprietors of this store?

A. Yes, sir.

92 By the COURT: Now, of course the witness must show she knows this, because if she shows that she don't know then I will strike it out; if she says she knows it from heresay it will be struck out; let her state how she knows this fact.

13. You were administrator at Hamilton yourself, were you not?

A. Yes, sir; at Hamilton myself, and it was administered on in San Francisco, too. There was a special administrator appointed for the State of California.

14. Well, the thousand dollars that were in the—you had personal knowledge of the thousand dollars that was in the Matthewson's safe, did you?

Def't objects as leading. Sustained.

15. Were you in your husband's office frequently?

A. Yes, sir.

16. Did you ever assist him in his work there?

A. Yes, sir; always with the county books, and in the fall tax time.

17. He had two safes, I believe, had he?

A. Yes, sir.

18. As has been already shown, one was Wells-Fargo's
93 and the other was the county safe?
A. Yes, sir.
19. Where did he keep the money that belonged to the county?
A. In the county safe.
20. In the county safe?
A. Yes, sir.
21. How do you know about this thousand dollars being at Matthewson's.
A. A portion of it I received the day after his death, and the balance about three months after.
22. And the balance about three months after?
A. Yes, sir.
23. Did you come to the knowledge of the money in the bank at Eureka by reason of your being administrator?
A. And going to see the books; everything was taken from the books.
24. Well, I will ask you if you received the balance—have you ever received the balance of the money from the bank at Eurka?
A. Yes, sir.
25. You did.
A. Yes, sir.
26. Now, you say there was a special administrator appointed for the property—for the money in California?
94 A. Yes, sir.
27. Do you know who that was?
A. Frank Avery.
28. Who was Frank Avery?
A. He married a cousin of mine.
29. He married a cousin of yours?
A. Yes, sir.
30. And he gave bonds there in California, did he?

Objected to as not the best evidence and improper.

31. Well, do you know whether or not he was appointed administrator in California?
A. Yes, sir; he gave a twenty-thousand-dollar bond.

By the COURT: It is entirely immaterial whether he gave twenty thousand or twenty millions.

32. Has the California administrator accounted to you for the money that was there.
A. Not for all it; no, sir.
33. Not for all of it; for how much?
A. Well——
34. How much of it did he account to you for?

Objected to as immaterial and not the best evidence.

A. I received $150 a month until last January—a year ago last January; the balance of it is in the bank yet.

95 35. You recived $150 a month until a year ago last January?

A. That would be just a year.

36. January, 1884; $150.00 a month?

A. Yes, sir.

37. And you have received, then, about $1,800, and the balance is there?

A. Some of it is there and some had been taken out.

38. Yes. How often were you with your husband in the office at his place of business?

A. Every day.

39. Every day?

A. Yes, sir.

40. Now, he was treasurer, as has been already shown, and agent for Wells, Fargo and Company. Did he assist in the work of Matthewson's store?

A. Yes, sir.

41. He did?

A. Yes, sir.

42. Between the first day of October, 1882, and up to the time of his death, did you know of any enterprise or business that he engaged in or embarked in between those dates?

A. No, sir.

43. I mean in addition or different from his business of treasurer and agent for Wells, Fargo and of working for Matthewson's?

96 A. No, sir.

44. Didn't. Do you know of any enterprise between those two dates that he embarked in or that he had been engaged in that required any large amount of money?

A. No, sir.

45. You did not?

A. No, sir.

46. Do you know of his carrying—of his being agent for persons who owned stocks—that is, to pay assessments for them?

A. Yes, sir.

47. Can you explain how that was; whether or not he advanced his own money or paid their money that they gave him?

A. He bought through a broker in San Francisco and charged it up to them and they were responsible for it.

48. And they paid to him the money that——

A. Yes, sir.

49. Eh?

A. Yes, sir.

50. Did you go to the other door? Mr. J. B. Matthewson, you will remember, testifies to two doors that were used for ingress and egress while the two other doors were fastened with bars on the inside. Did you go to the other door to ascertain whether or not

97 it was locked; whether the sash door was locked?

A. No, sir.

51. At the time that Mr. Matthewson did, or before or after?

A. No, sir.

52. Now, when you went there the first time with Mr. Kenny you didn't try or did you——

Objected to as part of plaintiff's main case.

53. This is a matter I omitted in the other part of our case. Did you or not try the sash door? Did you or not try the sash door that led into the store, that was behind the iron door, to see whether it was open or not?

A. No, sir.

54. You did not?

A. No, sir.

Cross-examination:

1. Has the estate been closed of which you are the administrator—been closed up in Hamilton?

A. No, sir.

2. It has not?

A. No, sir.

3. Has any claims been filed against you as administrator?

A. Yes, sir.

4. How much in amount?

98 A. I couldn't tell you.

5. Could you approximate?

A. No, sir; the business was left in the hands of a gentleman who has a power of attorney, so I don't know anything about it.

6. But you do know that claims have been filed, don't you?

A. Yes, sir.

7. You say you received from San Francisco $150 a month until a year ago last January?

A. Yes, sir; the first of January, 1884.

8. Yes; that would be for two years?

A. No.

9. No; for one year. Do you know how you happened to receive that—whether upon order of court?

A. Yes, sir.

10. Order of court for your support?

A. Yes, sir.

11. Do you know whether any claims have been filed against the estate in San Francisco?

A. Yes, sir.

12. There have been?

A. Yes, sir.

13. Do you know whether or not those claims are large or small?

A. No, sir; I don't know how much they are.

99 14. But you have got no other money from these except what you got under this order for your support?

A. No, sir; that's all.

15. Did you find this—this money, this thousand dollars—in the Matthewson Bros.' safe?

A. Part of it was given to me to defray the expenses of the funeral.

16. Part of it was given to you to defray the funeral expenses?

A. Yes, sir.
17. By whom?
A. By Mr. Raum, the sheriff.
18. Yes; and how about the rest of it?
A. It was given to the estate afterwards.
19. To the administrator?
A. Yes, sir; some of it.
20. What?
A. A temporary administrator was appointed until April, and he gave some of it to me on my return from California, and then I was appointed administrator from April.
21. And then the temporary administrator turned over part of it to you as administrator?
A. Yes, sir.
100 22. And then claims have been filed against you as administrator?
A. Yes, sir.
23. And now your administrator business is being managed by some one who has a power of attorney out there?
A. Yes, sir.
24. This money at Eureka was paid to you as administrator, was it? I take it was.
A. By Mr. Row; yes, sir.
25. Yes; by Mr. Row, the temporary administrator?
A. Yes, sir.
26. And by him turned over to you as permanent administrator?
A. Yes, sir.
27. Had he any other insurance on his life?
A. Yes, sir.
28. How much?
A. $8,500 in the Masonic Aid Association.
29. Have you received that?
A. I have; yes, sir.
30. That has come to you personally, I take it.
A. Yes, sir.

Both parties here state to the court that they have no further testimony to offer.

(Here follows diagram marked p. 101.)

102 And this is all the evidence given and received or offered on the trial of said cause, with the rulings of the court upon the offer or introduction of evidence and the exceptions taken to the rulings of the court thereon; and now the defendant, in writing, requests the court to give the jury the following instructions and each thereof:

I.

The burden of proof is upon the plaintiff to establish by a preponderance of credible testimony that the deceased came to his death from injuries (or an injury) effected through external, violent,

and accidental means within the intent and meaning of the contract and conditions expressed in the policy.

II.

Suicide and intentional injuries inflicted upon the insured are not accidental means of death within the meaning of the policy, and in order to recover plaintiff must establish by a preponderance of the evidence that Mr. McConkey came to his death by some other means than by suicide or intentional injuries inflicted upon him, and if plaintiff fails so to establish her case by a preponderance of the evidence your verdict should be for the defendant.

III.

103 Plaintiff must establish by direct and positive proof that the death was caused by external violence and accidental means, and failing in this she will not be entitled to a verdict.

IV.

Plaintiff's case must not rest upon mere conjecture, but her proof must be such as to lead directly to the conclusion that the death was effected by accidental means within the meaning of the policy, and unless she has adduced proof of that character your verdict should be for the defendant.

V.

If the evidence is equally consistent with the position of the plaintiff and with that of the defendant your verdict should be for the defendant.

VI.

If you find the evidence actually adduced to be equally consistent with an accidental death within the meaning of the policy and with a death effected by means not accidental within the meaning of the policy your verdict should be for the defendant.

VII.

Plaintiff must make out her case by proofs and not by mere presumption, and you should not give her a verdict upon any mere presumption unless her evidence leads directly to show that the death was effected by the accidental means which plaintiff is required to prove.

104 VIII.

Plaintiff, in order to be entitled to a verdict, must prove to you by what means the death was effected. It is not sufficient that she prove a death which may have been accidental in some undefined and unnamed manner. She must have evidence tending to show definitely in what manner the death was received, and if she has not such evidence your verdict should be for the defendant.

IX.

Murder is an intentional injury within the meaning of this policy. An injury inflicted intentionally by another person than the deceased is an intentional injury within the meaning of the policy. The policy was not intended to insure against murder, nor against injuries inflicted intentionally by another person than the deceased.

X.

Plaintiff must show by a preponderance of the evidence that the deceased came to his death by accidental means, which under this policy do not include suicide or murder, and if she has not so shown your verdict should be for defendant.

105 And now, after the argument of counsel, the court adjourns for the night.

And now, upon the coming in of court and the calling of the jury, on the morning of this April 17th, 1885, the court refuses each instruction asked by the defendant except those numbered I, III, and IV, and defendant at the time excepts to the refusal of the court to give that numbered II, and excepts to the refusal to give that numbered V, and excepts to the refusal to give that numbered VI, and excepts to the refusal to give that numbered VII, and excepts to the refusal to give that numbered IX, and excepts to the refusal to give that numbered X. And the court refuses to give those numbered I, III, and IV aforesaid without modification, and defendant excepts to such refusal, and severally as to each of said instructions numbered I, III, and IV.

And the court instructs the jury as follows, the instructions being given by the court of its own motion, all but those three at the end, numbered I, III, and IV, which three are the same as above referred to under said numbers, but with modification and qualification added by the court.

106 The plaintiff in this action counts upon a policy of accident insurance issued by the defendant to her husband, Geo. W. Conkey. The policy covers bodily injuries effected through "external, violent, and accidental means," and it provides, among other things in substance, that no claim shall be made under the policy when the death shall result from intentional injuries inflicted by the insured or by any other person.

The plaintiff exhibits the policy in evidence, and gives evidence of the fact that the insured was found dead within the life of the policy, from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by "external and violent means," and the only question is whether the means by which he came to his death were also "accidental."

It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence that suicide cannot be

presumed. The plaintiff is therefore entitled to recover un-
107 less the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.

Neither is murder to be presumed by the jury; crime is never to be presumed; but if the jury find from the evidence that the insured was in fact murdered, the death was an accident as to him the same as if he had been killed by the falling of a house or the derailment of a railway car in which he was a passenger. If the jury find that the injuries of the insured resulting in his death were not intentional on his part the plaintiff has a right to recover.

But if the jury find that the injuries inflicted upon the assured causing his death, whether by the assured himself or any other person, were intentional on the part of the assured the plaintiff cannot recover in this action.

The inquiry, therefore, before the jury is resolved into a question of suicide, because if the insured was murdered the destruc-
108 tion of his life was not intentional on his part.

The defendant, in its answer, alleges that the death of the insured was caused by suicide.

The burden of proving this allegation by a preponderance of evidence rests on the defendant. The presumption is that the death was not voluntary; and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary.

The death of the assured in this case was a mysterious affair. The jury cannot expect to find certainly with respect to it. It is a question of probabilities, and the jury must accept the greater probability in view of the evidence. The jury may and must consider those presumptions of fact which belong to the ordinary and usual course of human conduct and human nature; when we see in the physical world two or more facts uniformly connected, one following the one, we ascribe to them the relation of cause and effect. So in the moral world. If we find a fact of human conduct
109 generally or usually connected with another fact, we are apt to attribute to them the relation of cause and effect. But when we find by experience that any event in human life is very rarely connected with a given human action we attribute to them a mere casual—not causal—connection. Thus we find death very rarely connected with suicide.

Of the whole number of deaths that occur in the world not one, perhaps, in a hundred is voluntary. If this be the proportion, then, when we see a man dead in consequence of external violence the chances are but one to one hundred that he destroyed his own life. But since the disconnection between death—suicide is not uniform and invariable like a law of physical nature—since, on the contrary, we know by experience that men do sometimes, though rarely, even when entirely rational under a burden of existence which they have not the fortitude to bear take their own lives, the presumption against voluntary death may be overcome by evidence.

110 And when we look inward we find in every human soul that intense and most invariable of all instincts, the fear of death; of this instinct the greatest master of human nature that ever lived says:

"The most loathed, &c." So strong is this instict that men cling to life with the last gasp of their existence. Hopeless sorrow, imprisonment, ghastly wounds, bodily torment, excrutiating pain, starving poverty—all of these and more—men almost universally endure rather than extinguish that spark of life by which they might instantly escape from all their suffering and sorrows. Thus do men ordinarily bear all the ills of existence rather than fly to others that they know not of. The brave soldier dying the death of a hero on the battle-field, and the coward on his legs, running away from his post of duty, are alike under the power of this instinct. So strong is this principle in human nature that men generally find in suicide

111 an argument of insanity. They say that no rational man would destroy his own existence, and although we know by experience that this is not true, since rational men have been known to die by their own voluntary act, yet all admit that suicide strengthens the presumption of insanity in connection with other facts tending to that conclusion.

In order, therefore, to sustain the plea of suicide the defendant must have given to the jury evidence sufficient to overcome the presumption to which I have referred, and to convince the jury that the injury from which the insured died was voluntary or intentional on his part.

I.

The burden of proof is upon the plaintiff to establish, by a preponderance of credible testimony, that the deceased came to his death from injuries (or an injury) effected through external, violent, and accidental means within the intent and meaning of the contract and conditions expressed in the policy.

Given with this explanation that it does clearly appear

112 from the evidence that the insured *the insured* came to his death from injuries or an injury effected through violent and — means, and that the presumption is that the means were unintentional on the part of the insured, which the court holds satisfies the contract, this presumed fact is not conclusive and may be overcome by evidence, if such there is in the case, that the injuries were voluntary or intentional.

III.

Plaintiff must establish by direct and positive proof that the death was caused by external violence and accidental means, and, failing in this, she will not be entitled to a verdict.

Given with the qualification below.

Qualification.

Given with this qualification, that, the external violence appearing in the fact that the death ensued from a pistol shot through the

heart, the presumption is that it was accidental—not intentional—on the part of the assured, which facts, proved and presumed, make out the plaintiff's case unless the defendants has satisfied the jury
113 by affirmative proof that the means of death were intentional on the part of the insured.

IV.

Plaintiff's case must not rest upon mere conjecture, but her proof must be such as to lead directly to the conclusion that the death was effected by accidental means within the meaning of the policy, and unless she have adduced proof of that character your verdict should be for the defendant.

Given with the same qualification.

And in the charge of the court contained in the foregoing instructions given defendant at the time excepts to the following matters of law, to wit:

1st. The court charges the jury as aforesaid in the following language: "It is manifest that self destruction cannot be presumed; so strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence that suicide cannot be presumed. The plaintiff is therefore entitled to recover unless the defendant has, by competent evidence, overcome this presumption and satisfied the jury by a preponderance of evi-
114 dence that the injuries which caused the death of the insured were intentional on his part."

And defendant particularly excepts to the last three words above quoted, namely, "on his part," and to the matter of law therein stated; also to the requirement that defendant must produce a preponderance of evidence, as charged in said language.

Also to the charge contained in said language as to the presumption against suicide and the effect of such presumption in point of fact.

2nd. The court charges the jury as aforesaid in the following language:

"But if the jury find from the evidence that the insured was in fact murdered the death was an accident as to him the same as if he had been killed by the falling of a house or the derailment of a railway car in which he was a passenger. If the jury find that the injuries of the insured resulting in his death were not intentional on his part the plaintiff has a right to recover."

And defendant particularly excepts to all of said language and to the matter of law therein stated.

115 3rd. The court charges the jury as aforesaid in the following language:

"The inquiry before the jury therefore is resolved into a question of suicide, because if the insured was murdered the destruction of his life was not intentional on his part;" and defendant particularly excepts to all of said language and to the matter of law therein stated.

4th. The court charges the jury as aforesaid in the following language:

"The defendant in its answer alleges that the death of the insured

was caused by suicide. The burden of proving this allegation by a preponderance of the evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary."

And defendant particularly excepts to all of said language following and including the words "the burden of proving" and to the matter of law therein stated.

116 5th. The court charges the jury as aforesaid in the following language: "Thus we find death very rarely connected with suicide. Of the whole number of deaths that occur in the world not one perhaps in a hundred is voluntary. If this be the proportion, then, when we see a man dead in consequence of external violence, the chances are but one to one hundred that he destroyed his own life."

And defendant particularly excepts to all of said language and to the matter of law therein stated.

6th. The court charges the jury as aforesaid in the following language: "In order, therefore, to sustain the plea of suicide the defendant must have given to the jury evidence sufficient to overcome the presumption to which I have referred and to convince the jury that the injury from which the insured died was voluntary or intentional on his part."

And defendant particularly excepts to all of said language and to the matter of law therein stated.

117 7th. The court charges the jury as aforesaid in the modification or qualification added to the instruction asked by defendant and numbered I in the following language: "The presumption is that the means were unintentional on the part of the insured, which, the court holds, satisfies the contract."

And defendant particularly excepts to all of said language and to the matter of law therein stated.

8th. The court charges the jury as aforesaid in the modification or qualification added in the instruction asked by defendant and numbered III in the following language: "The presumption is that it was accidental—not intentional—on the part of the assured, which facts, proved and presumed, make out the plaintiff's case unless the defendant has satisfied the jury by affirmative proof that the means of death were intentional on the part of the insured."

And defendant particularly excepts to all of said language and to the matter of law therein stated, and in like manner excepts to the same language and matter of law stated in the modification

118 or qualification added to the instruction asked by defendant and numbered IV.

And the defendant particularly excepts to the following matters of law stated in the charges given by the court to the jury, viz:

That the plaintiff can recover if the insured was murdered.

That plaintiff can recover if the insured came to his death by external and violent means not intentional on his part; that, external and violent means of death having been proved, plaintiff is enti-

tled to recover unless it is shown that the injuries which caused the death of the insured were intentional on his part.

That if the insured was murdered the death was accidental as to him.

That, if the injuries resulting in the death of the insured were not intentional on his part, plaintiff has a right to recover; that in effect the words in the policy "intentional injuries inflicted by the insured or any other person" mean intentional on the part of the insured only; that said words do not include murder.

119 That said words do not include injuries which were intentional on the part of another person than the insured, if not intentional on the part of the insured.

That the burden of proof is upon the defendant to prove suicide.

That there is a presumption against suicide, which defendant must overcome.

The charge as to the effect of the presumption against suicide.

The charge as to the probability of suicide in point of fact.

The detail of the charge upon the presumption against suicide.

The charge as to the degree of proof required of defendant to overcome the presumption against suicide.

The charge that defendant must satisfy the jury by affirmative proof that the means of death were intentional on the part of the insured.

120 And the defendant presents this its bill of exceptions and asks that the same may be signed and made a part of the record herein, which is done accordingly.

J. M. LOVE, *Judge.*

121 [Endorsed:] No. 204. Sadie P. McConkey *vs.* Travelers' Insurance Co. Bill of exceptions. Filed this 5th day of May, A. D. 1885. A. J. Van Duzee, clerk, by Alfred Hobbs, deputy.

122 And afterwards, to wit, on the 10th day of June, A. D. 1885 there was filed in said court a writ of error bond in the words and figures following, to wit:

123 HARTFORD, CONN., *June* 6, 1885.

At a meeting of the board of directors of the Traveler's Insurance Company held at its office, in Hartford, on the above date, a quorum of said directors being present, it was voted that David B. Henderson, Louis G. Hurd, and Francis B. Daniels, partners in the law firm of Henderson, Hurd & Daniels and attorn*ies* for this company in the suit of McConkey *vs.* Travelers' Insurance Company, be, and they are hereby, authorized to execute a good and sufficient bond in the name of this company, to operate as a supersedeas, to stay execution on the judgment rendered in said suit.

Attest: JOHN E. MORRIS,
[SEAL.] *Ass't Sec't'y.*

The above is a true copy of a vote of the board of directors of the Travelers' Insurance Co. as appears from the records of said company.

[SEAL.] JOHN E. MORRIS,
Ass't Sec't'y.

124 Know all men by these presents that we, The Travelers' Insurance Company of Hartford, Conn., as principal, and Geo. B. Burch and Wm. L. Bradley, as security, are held and firmly bound unto Sadie P. McConkey in the full and just sum of ten thousand dollars, to be paid to the said Sadie P. McConkey, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

As witness our hands this 10th day of June, 1885.

Whereas lately at a term of the circuit court of the United States for the northern district of Iowa, eastern division, in a suit depending in said court between said Sadie P. McConkey, as plaintiff, and said Travelers' Insurance Company of Hartford, Conn., as defendant, judgment was rendered against the said Travelers' Insurance Company, and the said Travelers' Insurance Company has obtained a writ of error and lodged a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a
125 citation directed to the said Sadie P. McConkey, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Travelers' Insurance Company, the plaintiff in error, shall prosecute its writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TRAVELERS' INSURANCE COMPANY
OF HARTFORD, CONN.,
By DAVID B. HENDERSON,
LOUIS G. HURD, AND
FRANCIS B. DANIELS,
HENDERSON, HURD & DANIELS,
Its Attorneys.

GEO. B. BURCH.
WM. L. BRADLEY.

126 STATE OF IOWA, } *ss:*
County of Dubuque, }

Each of the undersigned, being duly sworn, deposes and says that he is a surety on the foregoing bond; is a resident of the State of Iowa; is worth the sum of ten thousand dollars beyond the amount of his debts, and has property liable to execution in this State equal to the sum of ten thousand dollars.

GEO. B. BURCH.
WM. L. BRADLEY.

Subscribed and sworn to before me, a notary public of said State, in and for said county, this 10th day of June, 1885, as witness my hand and seal notarial.

[SEAL.] J. K. DEMMING,
Notary Public.

Security and bond approved.

O. P. SHIRAS, *Judge.*

127 [Endorsed:] Sadie P. McConkey *vs.* Travelers' Ins. Co. Supe's bond in appeal to Supreme Court, & authority to H., H. & D. to sign. Filed June 10, 1885. A. J. Van Duzee, clerk.

128 UNITED STATES OF AMERICA, } *ss:*
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of Sadie P. McConkey *vs.* The Travelers' Insurance Company of Hartford, Connecticut, defendant, No. 204, law, as fully as the same remain on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Dubuque, in said district, this 27th day of July, A. D. 1885.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE, *Clerk,*
By ALFRED HOBBS, *Deputy.*

129 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Sadie P. McConkey:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of Iowa, eastern division, wherein The Travelers' Insurance Company of Hartford, Conn., is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Dubuque, in said district, this 10th day of June, 1885.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque]

O. P. SHIRAS, *Judge.*

Service of above citation acknowledged this 11th day of June, A. D. 1885.

FOUKE & LYON,
WM. G. THOMPSON,
Attorneys for Sadie P. McConkey, Defendant in Error.

[Endorsed:] Filed June 11, 1885. A. J. Van Duzee, clerk.

130 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said circuit court before you, between Sadie P. McConkey, as plaintiff, and the Travelers' Insurance Company of Hartford, Conn., as defendant, a manifest error hath happened, to the great damage of the said Travelers' Insurance Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the tenth day of June, A. D. 1885.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa.

Allowed:
O. P. SHIRAS, *Judge.*

[Endorsed:] Filed June 10, 1885. A. J. Van Duzee, clerk.

131 *Assignment of Errors.*

To the Supreme Court of the United States:

The Travelers' Insurance Company of Hartford, Conn., comes now and says that in the record and proceedings, as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between Sadie P. McConkey, as plaintiff, and the said Travelers' Insurance Company, as defendant, manifest error hath happened, to

the great damage of the said Travelers' Insurance Company, and in the following particulars, in and upon each of which the said Travelers' Insurance Company assigns error, to wit:

I.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

132 "The burden of proof is upon plaintiff to establish by a preponderance of credible testimony that the deceased came to his death from injuries (or an injury) effected through external, violent, and accidental means, within the intent and meaning of the contract and conditions expressed in the policy."

II.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

133 "Suicide and intentional injuries inflicted upon the insured are not accidental means of death, within the meaning of the policy, and in order to recover plaintiff must establish by a preponderance of the evidence that Mr. McConkey came to his death by some other means than by suicide or intentional injuries inflicted upon him, and if plaintiff fails to establish her case by a preponderance of the evidence your verdict should be for the defendant."

III.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

134 "Plaintiff must establish by direct and positive proof that the death was caused by extreme violence and accidental means, and failing in this she will not be entitled to a verdict."

IV.

It assigns as error the refusal of the court to give the jury the instruction asked by the defendant below, which was in the following language, to wit:

135 "Plaintiff's case must not rest upon mere conjecture, but her proof must be such as to lead directly to the conclusion that the death was effected by accidental means, within the meaning of the policy, and unless she has adduced proof of that character your verdict should be for the defendant."

V.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

136 "If the evidence is equally consistent with the position of the plaintiff and with that of the defendant, your verdict should be for the defendant."

VI.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

137 "If you find the evidence actually adduced to be equally consistent with an accidental death, within the meaning of the policy, and with a death effected by means not accidental, within the meaning of the policy, your verdict should be for the defendant."

VII.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

138 "Plaintiff must make out her case by proofs and not by mere presumptions, and you should not give her a verdict upon any mere presumptions, unless her evidence tends directly to show that the death was effected by the accidental means which plaintiff is required to prove."

VIII.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

139 "Plaintiff, in order to be entitled to a verdict, must prove to you by what means the death was effected. It is not sufficient that she prove a death which may have been accidental in some undefined and unnamed manner. She must have evidence tending to show definitely in what manner the death was received, and if she has not such evidence your verdict should be for the defendant."

IX.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

140 "Murder is an intentional injury, within the meaning of this policy. An injury inflicted intentionally by another person than the deceased is an intentional injury, within the meaning of the policy. The policy was not intended to insure against murder nor against injuries inflicted intentionally by another person than the deceased."

X.

It assigns as error the refusal of the court to give to the jury the instruction asked by the defendant below, which was in the following language, to wit:

141 "Plaintiff must show by a preponderance of the evidence that the deceased came to his death by accidental means, which under this policy do not include suicide or murder, and if she has not so shown your verdict should be for the defendant."

XI.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language, to wit:

142 "It is manifest that self-destruction cannot be presumed; so strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. The plaintiff is, therefore, entitled to recover unless the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part."

XII.

It assigns as error the giving by the court to the jury of the last three words of that portion of the charge above quoted, to wit, the three words, "on his part."

XIII.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language, to wit:

143 "But if the jury find from the evidence that the insured was in fact murdered, the death was an accident as to him, the same as if he had been killed by the falling of a house or the derailment of a railway car in which he was a passenger. If the jury find that the injuries of the insured, resulting in his death, were not intentional on his part the plaintiff has a right to recover."

XIV.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language, to wit:

144 "The inquiry before the jury, therefore, is resolved into a question of suicide, because if the insured was murdered the destruction of his life was not intentional on his part."

XV.

It assigns as error the giving by the court to the jury of that portion of the charge which was in so much of the following language as begins with, includes, and follows the words "The burden of proving," to wit:

145 "The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of the evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary."

XVI.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language, to wit:

146 "Thus we find death very rarely connected with suicide. Of the whole number of deaths that occur in the world not one, perhaps, in a hundred is voluntary. If this be the proportion, then when we see a man dead in consequence of external violence the chances are but one to one hundred that he destroyed his own life."

XVII.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language, to wit:

147 "In order, therefore, to sustain the plea of suicide the defendant must have given to the jury evidence sufficient to overcome the presumption to which I have referred and to convince the jury that the injury from which the insured died was voluntary or intentional on his part."

XVIII.

It assigns as error the refusal of the court to give to the jury without modification the instruction quoted in the foregoing assignment numbered I.

XIX.

It assigns as error the giving by the court to the jury of said last-mentioned instruction with the modification (or explanation) given therewith, the said instruction and modification (or explanation) having been given in the following language, to wit:

148 "The burden of proof is upon the plaintiff to establish, by a preponderence of credible testimony, that the deceased came to his death from injuries (or any injury) effected through external, violent, and accidental means, within the intent and meaning of the contract and conditions expressed in the policy."

149 "Given with the explanation that it does clearly appear from the evidence that the insured came to his death from injuries (or an injury) effected through violent means, and that the presumption is that the means were unintentional on the part of the insured, which the court holds satisfies the contract, this presumed fact is not conclusive and may be overcome by evidence, if such there is in the case, that the injuries were voluntary or intentional."

XX.

It assigns as error the giving by the court to the jury of that portion of the charge which was in said modification (or explanation).

XXI.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language of said modification (or explanation), to wit:

150 "The presumption is that the means were unintentional on the part of the insured, which the court holds satisfies the contract."

XXII.

It assigns as error the refusal of the court to give to the jury without modification the instruction quoted in the foregoing assignment numbered III.

XXIII.

It assigns as error the giving by the court to the jury of said last-mentioned instruction with the modification (or qualification) given therewith, the said instruction and modification (or qualification) having been given in the following language, to wit:

151 "Plaintiff must establish by direct and posative proof that the death was caused by external violence and accidental means, and failing in this she will not be entitled to a verdict."

152 "Given with this qualification that the external violence appearing in the fact that the death ensued from pistol shot through the heart the presumption is that it was accidental, not intentional, on the part of the assured, which facts, proved and presumed, make out the plaintiff's case, unless the defendant has satisfied the jury by affirmative proof that the means of death were intentional on the part of the insured."

XXIV.

It assigns as error the giving by the court to the jury of that portion of the charge which was in said modification (or qualification).

XXV.

It assigns as error the giving by the court to the jury of that portion of the charge which was in the following language of said modification (or qualification), to wit:

153 "The presumption is that it was accidental, not intentional, on the part of the assured, which facts, proved and presumed, make out the plaintiff's case, unless the defendant has satisfied the jury by affirmative proof that the means of death were intentional on the part of the insured."

XXVI.

It assigns as error the refusal of the court to give to the jury without modification the instruction quoted in the foregoing assignment numbered IV.

XXVII.

It assigns as error the giving by the court to the jury of said last-mentioned instruction with the modification (or qualification) given therewith, the said instruction and modification (or qualification) having been given in the following language, to wit:

154 "Plaintiff's case must not rest upon mere conjecture, but her proof must be such as to lead directly to the conclusion that the death was effected by accidental means, within the meaning of the policy, and unless he has adduced proof of that character your verdict should be for the defendant."

155 "Given with this qualification that this external violence appearing in the fact that the death ensued from a pistol shot through the heart, the presumption is that it was accidental, not intentional, on the part of the insured, which facts, proved and presumed, make out the plaintiff's case, unless the defendant has satisfied the jury by affirmative proof that the means of death were intentional on the part of the insured."

XXVIII.

It assigns as error the giving by the court to the jury in the last above connection of that portion of the charge which was in the language quoted under the foregoing assignment numbered XXV.

156 XXIX.

It assigns as error the charge of the court to the jury that plaintiff can recover if the insured was murdered.

XXX.

It assigns as error the charge of the court to the jury that plaintiff can recover if the insured came to his death by external and violent means, not intentional on his part.

XXXI.

It assigns as error the charge of the court to the jury that external and violent means of death having been proved plaintiff is entitled to recover, unless it is shown that the injuries which caused the death of the insured were intentional on his part.

XXXII.

It assigns as error the charge of the court to the jury that if the insured was murdered the death was accidental as to him.

XXXIII.

It assigns as error the charge of the court to the jury that if the injuries resulting in the death of the insured were not intentional on his part plaintiff has a right to recover.

XXXIV.

It assigns as error the charge of the court to the jury that in effect the words in the policy " intentional injuries inflicted
157 by the insured or any other person " mean intentional on the part of the insured only.

XXXV.

It assigns as error the charge of the court to the jury that said words do not include murder.

XXXVI.

It assigns as error the charge of the court to the jury that said words do not include injuries which were intentional on the part of another person than the insured if not intentional on the part of the insured.

XXXVII.

It assigns as error the charge of the court to the jury that the burden of proof is upon the defendant to prove suicide.

XXXVIII.

It assigns as error the charge of the court to the jury that there is a presumption against suicide which defendant must overcome.

XXXIX.

It assigns as error the charge of the court to the jury as to the effect of the presumption against suicide.

XL.

It assigns as error the charge of the court to the jury as to the probability of suicide in point of fact.

XLI.

It assigns as error the detail of the charge of the court to the jury upon the presumption against suicide.

158 XLII.

It assigns as error the charge of the court to the jury as to the degree of proof required of defendant to overcome the presumption against suicide.

XLIII.

It assigns as error the charge of the court to the jury that defendant must satisfy the jury by affirmative proof that the means of death were intentional on the part of the insured.

XLIV.

It assigns as error the overruling of the motion for new trial.

XLV.

It assigns as error the rendition of the judgment.

159 And the record and proceedings aforesaid, together with a prayer for reversal, are herewith presented to the Supreme Court of the United States, with a writ of error sued out by the said Travelers' Insurance Company to such effect.

And the said Travelers' Insurance Company prays that the errors may be considered and corrected and the judgment aforesaid reversed, annul-ed, and held for naught, and that the said Travelers' Insurance Company may be restored to all things which it hath lost by occasion of the said judgment.

DYER, LEE & ELLIS,
HENDERSON, HURD, & DANIELS,
DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Attorneys and of Counsel for the Travelers' Insurance Company of Hartford, Conn., the Plaintiff in Error.

[Endorsed:] Filed June 11, 1885. A. J. Van Duzee, clerk.

160 *Prayer for Reversal.*

To the Supreme Court of the United States:

The Travelers' Insurance Company of Hartford, Conn., comes now and says that in the record and proceedings, as also in the rendition of the judgment, of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between Sadie P. McConkey as plaintiff and the said Travelers' Insurance Company as defendant, manifest error hath happened to the great damage of the said Travelers' Insurance Company, and the said Travelers' Insurance Company hath thereupon sued out a writ of error that the record and proceedings may be sent to the Supreme Court of the United States to the end that error may be corrected and full and speedy justice done: Now, therefore, the said Travelers' Insurance Company, as plaintiff in error, humbly prays for the correction of such error and for reversal of said judgment, and thus will ever pray.

DYER, LEE & ELLIS,
HENDERSON, HURD & DANIELS,
DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Attorneys and of Counsel for the Travelers' Insurance Company of Hartford, Conn., the Plaintiff in Error.

[Endorsed:] Filed June 11, 1885. A. J. Van Duzee, clerk.

161 UNITED STATES OF AMERICA, *Northern District of Iowa,* } *ss:*

I, A. J. Van Duyee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify and return

that the writ of error, which is hereto attached, was served and filed in my office at Dubuque, Iowa, on the 10th day of June, A. D. 1885, and a copy thereof at the same time lodged in my office, and I now return said writ of error and, annexed thereto and hereto attached, an authenticated copy of the record of the cause mentioned in said writ and the following-named papers filed thereon, to wit, the assignment of errors, the prayer for reversal, and the citation and proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Dubuque, in said district, the 27th day of July, A. D. 1885.

{ Seal Circuit Court U. S., Northern District of Iowa. Dubuque. }

A. J. VAN DUYEE, *Clerk.*
By ALFRED HOBBS, *Deputy.*

Endorsed on cover: C. C. U. S., N. Iowa. No. 273. The Travelers' Insurance Company of Hartford, Conn; plaintiff in error, *vs.* Sadie P. McConkey. Filed August 19, 1885.

2661
197-661

FILED
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

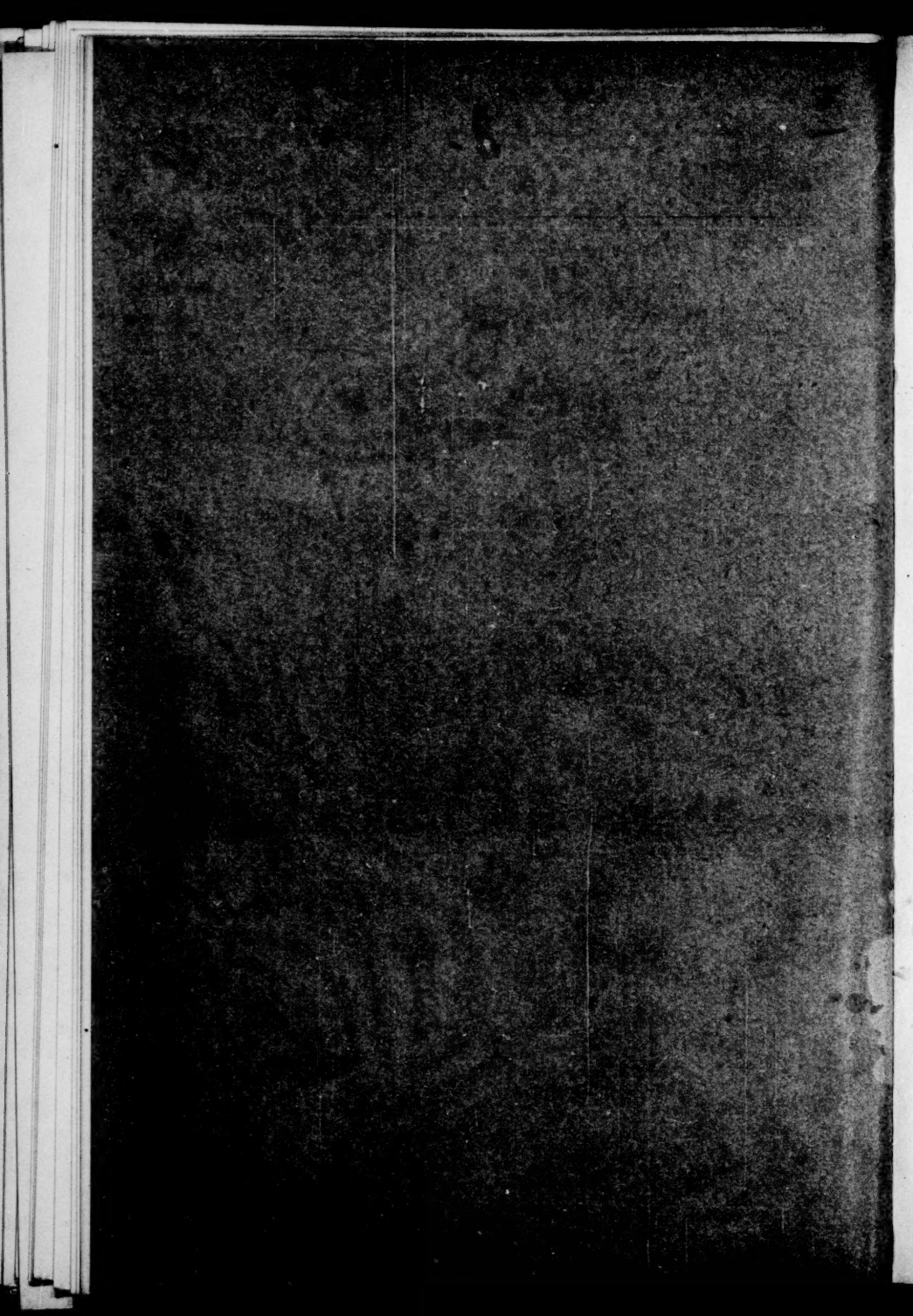
THE TRAVELERS' INSURANCE CO., OF HARTFORD, CONN.,
Plaintiff in Error,
vs.
SADIE P. McCONKEY,
Defendant in Error.
No. 273.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

B. D. LEE,
JOHN P. ELLIS,
Attorneys for Plaintiff in Error.

Nixon-Jones Printing Co., 210 and 212 Pine Street, St. Louis.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE TRAVELERS' INSURANCE CO., OF HARTFORD, CONN.,
Plaintiff in Error,
vs.
SADIE P. McCONKEY,
Defendant in Error.

No. 273.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

STATEMENT IN BEHALF OF PLAINTIFF IN ERROR.

This was an action upon a policy of accident insurance in the sum of $5,000. Suit was originally instituted in the State Circuit Court on December 4th, 1883, whence it was

removed by plaintiff in error to the United States Circuit Court. Trial was had on April 17th, 1885, before his Honor, Judge Love, and a jury, and a verdict rendered in behalf of plaintiff in the sum of $5,600.

The motion for new trial having been overruled, the cause was brought to this court by writ of error awarded June 10th, 1885.

The petition is in the usual form, and alleges that Sadie P. McConkey is the widow of George P. McConkey, late of Hamilton, in the State of Nevada; that on November 7th, 1882, the Travelers' Insurance Co., for a valuable consideration, executed and delivered to said McConkey an accident policy on his life in the sum of $5,000 for the period of one year, payable to said widow in case the death of said McConkey should, during that interval, be effected through external, violent and accidental means, said sum to be paid plaintiff within ninety days after sufficient proof of death of said insured by the means aforesaid; that the said McConkey, on January 2d, 1883, was accidently shot through the heart by a person or persons unknown, by reason of which accidental injury he instantly died; and that the company was thereupon duly notified.

The first count of the answer, in the form of a general denial, denies that the death of the insured was occasioned by injuries effected through violent, external, and accidental means, or that his death was effected through external violence, and accidental means, within the intent and meaning of the contract of insurance, and the conditions thereunto annexed.

For further answer, the following specific defenses are separately stated:

That the death of insured was caused by suicide.

That his death was caused by intentional injuries inflicted by the insured or some other person.

That his death was caused by intentional injuries inflicted by some other person than the insured.

In support of her case, claimant introduced in evidence

the policy of insurance, the material portions of which are as follows:—

* * * "The said sum insured to be paid to his wife, Sadie P. McConkey, * * * within ninety days after sufficient proof that the insured at any time within the continuance of this policy shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed, and said injuries alone shall have occasioned death within ninety days from the happening thereof * * * and no claim shall be made under this policy when the death may have been caused by * * * or intentional injuries inflicted by the insured or any other person * * * and this insurance shall not be held to extend to disappearance, nor to any case of death or personal injury unless the claimant under this policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means * * * and unless direct and affirmative proof of the same (the accidental injury) and of the death or duration of total disability shall be furnished to the company within seven months from the happening of said accident, then all claims accruing under this policy shall be waived and forfeited to the company. * * * All the provisions and conditions aforesaid and a strict compliance therewith during the continuance of this policy are conditions precedent to the making of this contract."

The proof of loss was not introduced, but it was conceded that the proof had been made to the company, that insured died from the effect of a pistol shot.

The claimant in her own behalf testified that she and her husband, the deceased, lived at the time of his death at Hamilton, White Pine County, Nevada; that he was County Treasurer and Agent of the Wells-Fargo Express Company, having an office in the rear portion of the store of Matthewson & Bros. On the evening of January 1st, 1883, about 9 o'clock, he escorted her to a New Year's ball at Withington

Hall, where he left her between 10 and 11 o'clock, stating that he would go to his office, distant a block and a half, do some work on the Treasurer's books, and return for her at 12 o'clock, in time for supper. Failing to appear at the appointed hour, she became apprehensive, and between 12 and 1 o'clock, went in company with a friend to the store, which she found closed and without lights. She rapped at the door and receiving no response, she returned to the hall. About 3 o'clock she went again to the store, and, being unable to gain admission, she repaired to the residence of Matthewson, the proprietor, obtained a key and returned to the store. Her companion unlocked the door and lighted a candle, and she discovered her husband lying on the floor dead in front of the Treasurer's safe. He was shot through the heart, and a revolver with one chamber discharged was lying near him on the floor. His coat, which was fashioned to button in front, was open, and she saw the hole made by the bal penetrating his vest and shirt. The treasurer's safe was open, and a number of pieces of coin, gold and silver, were lying round on the floor near the safe. The treasurer's books were open and lying on the desk.

Claimant here rested her case.

On the part of defendant, the evidence showed that at the time the deceased was discovered he was lying on his back apparently as if he had sunk down from his desk to the floor. His coat was unbuttoned and not discolored, but his vest, underwear and flesh were powder-burnt, and plainly showed that the weapon had been discharged in close proximity to his breast. The revolver with which the wound was inflicted was a navy Colt, belonging to Matthewson, the proprietor of the store. It had been loaded and lying since the previous February upon the said proprietor's desk in a remote part of the store. The finger-marks in the dust on the desk showed that it had been removed from said desk that night. The ball extracted from the body of deceased was the counterpart of those remaining in the other chambers of the revolver. One chamber showed that it had been

freshly discharged. The interior of the store presented no evidence of a struggle, or other violence. The outer door of the Wells, Fargo & Co. safe was open, and the key in the inner door, but the contents were intact. The treasurer's safe was unlocked and open, and was afterwards found to contain $13,764.80. His four years' term of office as treasurer expired December 31st, 1882, and he was required by law, and had agreed, to turn over to his successor in office, on the following day, January 2nd, the county books, safe and funds. A prompt official investigation, after death, showed a deficit in his accounts as treasurer of $11,092.33. There should have been in the safe $24,857.13.

For two years previous to his death he had been carrying on his own account 5300 shares of Star mining stock, which had never paid any dividend, and had been regularly assessed every sixty days for ten or twenty cents per share. He was also carrying other stocks in large amounts for himself and other parties which had been regularly assessed. His books were in no condition to be turned over to his successor. Not a single ledger or journal account being balanced.

In addition to the present policy for $5,000, taken out November 7th, 1882, his life was insured for the benefit of his wife in the Masonic Aid Association in the sum of $8,500.

The claimant offered no testimony in solution of his death and none in rebuttal of the facts shown by the insurance company.

The questions involved in this case arose upon errors of the court in instructions given to the jury, and in refusing certain instructions prayed by plaintiff in error, which fully appear in the assignment of errors.

ASSIGNMENT OF ERRORS.

Plaintiff in error assigns the following errors on the part of the circuit court at the trial of this cause:—

I.

There was no testimony tending to show that insured died by accidental means. On the contrary the uncontradicted evidence showed that his death was not accidental, and it was error to submit the question to the jury.

II.

Errors on the part of the Court in refusing to charge the Jury as prayed by defendant. The defendant prayed the Court to charge the Jury as follows:

1. "The burden of proof is upon the plaintiff to establish by a preponderance of credible testimony that deceased came to his death from injuries (or an injury) effected through external, violent and accidental means within the intent and meaning of the contract and conditions expressed in the policy."

But the Court refused to grant said prayer and modified the same in the charge given as hereafter appears. To which ruling of the Court defendant then and there excepted.

2. "Suicide and intentional injuries inflicted upon the insured are not accidental means of death within the meaning of the policy and in order to recover plaintiff must establish by a preponderance of the evidence that Mr. McConkey came to his death by some other means than by suicide or intentional injuries inflicted upon him and

if plaintiff fails so to establish her case by a preponderance of the evidence your verdict should be for the defendant."

But the Court refused to grant said prayer. To which ruling defendant then and there excepted.

3. "Plaintiff must establish, by direct and positive proof, that the death was caused by external violence and accidental means; and, failing in this, she will not be entitled to a verdict."

But the court refused to grant said prayer, and modified the same in the charge given, as hereinafter appears. To which ruling of the court defendant then and there excepted.

4. "Plaintiff's case must not rest upon mere conjecture, but her proof must be such as to lead directly to the conclusion that the death was effected by accidental means within the meaning of the policy; and unless she has adduced proof of that character, your verdict should be for the defendant."

But the court refused to grant said prayer, and modified the same in the charge given, as hereinafter appears. To which ruling defendant then and there excepted.

5. "Plaintiff must make out her case by proofs and not by mere presumption, and you should not give her a verdict unless her evidence leads directly to show that the death was effected by the accidental means which plaintiff is required to prove."

But the Court refused to grant said prayer, to which ruling defendant then and there excepted.

6th. "Plaintiff in order to be entitled to a verdict must prove to you by what means the death was effected. It is not sufficient that she prove a death which may have been accidental in some undefined and unnamed manner. She must have evidence tending to show definitely in what man-

ner the death was received, and if she has not such evidence your verdict should be for the defendant."

But the Court refused to grant said prayer—to which ruling defendant then and there excepted.

7. "Murder is an intentional injury within the meaning of this policy. An injury inflicted intentionally by another person than the deceased is an intentional injury within the meaning of this policy. The policy was not intended to insure against murder, nor against injuries inflicted intentionally by another person than the deceased."

But the court refused to grant said prayer, to which ruling defendant then and there excepted.

8. "Plaintiff must show by a preponderance of the evidence that deceased came to his death by accidental means, which, under this policy, do not include suicide or murder, and if she has not so shown your verdict should be for defendant."

But the court refused to grant said prayer, to which ruling defendant then and there excepted.

III.

Errors on the part of the court in its charges as given to the jury.

The court charged the jury as follows: —

1. "It is manifest that self-destruction cannot be presumed, so strong is the instinctive love of life in the human breast, and so uniform the efforts of men to preserve their existence that suicide cannot be presumed.

The plaintiff is, therefore, entitled to recover unless the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence, that the injuries which caused the death of the insured were intentional on his part."

To the granting of which charge defendant at the time excepted.

2. "But if the jury find from the evidence that the insured was in fact murdered, the death was an accident as to him, the same as if he had been killed by the falling of a house, or the derailment of a railway car in which he was a passenger, if the jury find that the injuries of the insured resulting in his death were not intentional on his part, the plaintiff has a right to recover."

To the giving of which charge defendant at the time excepted.

3. "The inquiry before the jury is resolved into a question of suicide, because if the insured was murdered, the destruction of his life was not intentional on his part."

To the giving of which charge defendant at the time excepted.

4. "The defendant in its answer alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of the evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on his part must overcome this presumption and satisfy the jury that the death was voluntary."

To giving of which charge defendant at the time excepted.

5. "Thus we find death very rarely connected with suicide. Of the whole number of deaths that occur in the world, not one, perhaps, in a hundred is voluntary. If this be the proportion, when we see a man dead in consequence of external violence the chances are but one in one hundred that he destroyed his own life."

To the giving of which charge defendant at the time excepted.

6. "In order, therefore, to sustain the plea of suicide, the defendant must have given to the jury sufficient evidence to remove the presumption to which I have referred, and to convince the jury that the injury from which the insured died was voluntary or intentional on his part."

To the giving of which charge defendant at the time excepted.

7. "So strong is this principle (instinct of self-preservation) in human nature, that men generally find in suicide an argument of insanity. They say that no rational man would destroy his own existence, and although we know by experience that this is not true, since rational men have been known to die from their own voluntary act, yet all admit that suicide strengthens the presumption of insanity, in connection with other facts tending to that conclusion."

To the giving of which charge defendant at the time excepted.

8. Charge No. 1, as refused, *supra*, was given with a modification attached thereto in the following words: —

"Given with this explanation, that it does clearly appear that the insured came to his death from injuries, or an injury, effected through violent and —— —— means, and that the presumption is that the means were unintentional on the part of the insured, which the court holds satisfies the contract. This presumed fact is not conclusive, and may be overcome by evidence, if such there be in the case, that the injuries were voluntary or intentional."

To the giving of which charge, with said modification or explanation, and to the giving of said modification or explanation, defendant at the time excepted.

9. Charge No. 3, as refused, *supra*, was given with a qualification attached in the following words: —

"Given with this qualification, that the external violence appearing in the fact that the death ensued from a pistol

shot through the heart, the presumption is that it was accidental, not intentional on the part of the assured, which facts, proved and presumed, make out the plaintiff's case, unless the defendant has satisfied the jury by affirmative proof that the means of death were intentional on part of the insured."

To the giving of which charge so qualified, and to such qualification, defendant at the time excepted.

10. Charge No. 4, as refused, *supra*, was given with the same qualification recited in the last preceding charge.

To the giving of which charge so qualified and to said qualification defendant at the time excepted.

BRIEF AND ARGUMENT.

I.

The burden of proof was on claimant upon the issue presented by the general denial to show that insured died by accidental violence.

Claimant was entitled to no presumption that the death shown to have occurred by violence was accidental.

The stipulation in the contract required that in case of death by violence, claimant should establish by "direct and positive proof" that the same was accidental.

The petition alleges that assured met his death by accident, described as a pistol shot through the heart. The first count or division of the answer, in the form of a general denial, traverses the allegation that said death was accidental. It was essential, in order to bring the loss within the terms of the policy, to aver in the petition that the death occurred by accident, and then, as stated in a recent decision, Freeman *v.* Traveler's Insurance Co., 144 Mass. 572, announcing a fundamental principle, "It is a general rule of all evidence that it is necessary for the party to prove the substantive facts which he is required affirmatively to aver in his pleading," or, in other words, show affirmatively that the insured died by accidental violence, as alleged.

The claimant in making out her case failed to introduce any evidence whatever tending to show that the injury was accidental, and the court by its charge to the jury relieved her of the burden of proof in this respect by invoking in her behalf a presumption of law that the death shown to have occurred by violence was accidental, thereby reversing

the natural and logical order, and imposing upon defendant the burden of proving the negative; that is to say, the burden of establishing to the satisfaction of the jury, by a preponderance of evidence, that the death was not accidental. Had the conditions of the policy been such, for instance, as in an ordinary life policy, where the defendant was required to plead suicide as a defense, it is conceded that defendant would have been compelled to establish the same by evidence, but in the present case, the vital issue was death by accident; the claimant asserted the affirmative of said issue, and was by law required to prove it. When the defense of suicide is made in actions upon policies of general life insurance, a well know author (Wharton & Stille's Medical Jurisprudence, section 914) says: "The burden in all such cases is on the insurer to show that the death was not natural but was imputable to suicide. This question is one of fact to be decided by the jury on the concrete case. If the case is in equilibrium, the presumption is against suicide." But the same author recognizes a marked distinction as to the burden of proof, between ordinary life policies and accident policies, and says concerning the latter, section 919: "Accident insurance, or insurance against death or injuries from accident, are subject in general to the same considerations as those which relate to life insurance. There are, however, several specific differences. In suits on accident policies death from accident must be proved. If it cannot be proved, then the plaintiff's case fails."

It is true that the answer, in addition to the general denial, as above stated, sets forth as separate and specific defenses that the death of the assured was occasioned by suicide, and further that his death was caused by intentional injuries inflicted by some other person. These are ordinarily affirmative defenses, and considered as being in avoidance of the cause of action alleged in the petition; but under the Iowa practice act they in no wise impair or affect the force of the preceding general denial and cannot be construed

as relieving plaintiff from proving every fact constitutive of the cause of action as alleged in the petition. Consequently it was necessary that claimant should have made the same proof, upon the trial of this cause as she would have been required to make had the answer been simply a general denial. The statutes of Iowa, section 2710, authorize separate and inconsistent defenses in the same answer, in addition to a general denial, and the legal effect thereof has been settled as we have stated by repeated judicial constructions. "A plea in the nature of confession in avoidance in one count of the answer does not destroy the force of a general denial in a preceding count. Quigley *v.* Merrit, 11 Iowa, 147."

"The admission in plea of justification cannot avail the plaintiff upon trial of the issue raised by general denial." Herzman *v.* Oberfelder, 54 Iowa, 83. See also to the same effect Barr *v.* Hack, 46 Iowa, 308. Tredway *v.* S. C. & St. P. R. Co. 526. Heinrichs *v.* Terrell, 65 Iowa, 25. The learned judge appears to have overlooked this peculiarity of the Iowa statute, and considered that the plea of suicide obliterated the general denial in the previous count, and that by the terms of the pleadings the burden of proof necessarily devolved upon defendant; hence his charge to the jury declares that "the defendant in his answer alleges that the death of the assured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant."

If our position be correct as to this question of pleading, it follows that the charge, as to the burden of proof, is erroneous, unless the presumption declared to have attached in favor of claimant can be sustained upon some other theory.

Upon the issue presented by the general denial, plaintiff had the affirmative and should have been required to show that the death of assured was, in fact, an accident. Certainly, to have adduced such evidence as would have supported the inference that the death was accidental. There

was upon said issue no foundation for the doctrine of presumption which the Court called to the aid of claimant in making out her case. To say, upon such issue, that the violent death of assured must be presumed in behalf of claimant to have been accidental, because, if homicidal, it would impute a crime to a third party, or, if suicidal, a grave offense to the insured, and be in violation of the natural instincts of self-preservation, is, as we conceive, a misapplication of the legitimate doctrine of presumption. The presumption of innocence had its origin in the domain of criminal law, and while it is true that such presumption obtains in civil cases, it is only when the issue tendered imputes a wrong to the other party, which it becomes necessary to prove. It was designed as a shield for the accused, and not a weapon for the prosecutor. The issue here tendered by the general denial, imputes no wrong to the beneficiary, the deceased, or any third party. His death may not have been accidental, yet it does not follow that deceased was culpable, as it may have been homicidal; and if a homicide, it may have been justifiable or excusable.

When a death occurs by violence, and nothing appears by way of evidence except the abstract killing, the law raises no presumption as to the manner of death, whether accidental, suicidal or homicidal. It may be urged that the law will not presume such death was criminal; neither, we submit, will it presume that it was accidental. There is no occasion for any presumption on the subject until a definite accusation is made, and then the presumption of innocence intervenes solely in behalf of the accused, and requires his guilt to be proven.

But, concede for the sake of argument, that in the case of death by violence, the law will presume in behalf of claimant, upon the absence of evidence to the contrary, that said death was innocent or accidental, we submit that it is necessarily impossible to show merely the abstract killing. Facts in the concrete must appear which indicate, with greater or less precision, the manner of the death; and if

the same testimony which discloses the death, furnishes a clew to the mystery, and indicates that the death was criminal, said presumption must instantly vanish, if it ever existed. Wharton on Evidence, Sec. 359. It is only in the absence of evidence to the contrary that it can be claimed, with any propriety, that the law will presume the death was accidental. Here the testimony of claimant herself, in establishing the death, brought prominently before the jury the facts furnishing the solution of the tragedy, and leading irresistibly to the conclusoin that the death was an act of self-destruction.

To use the language of Justice Field, in case of Ins. Co. *v.* Newton, 22 Wallace, 37: "The narrative of the manner of the death of deceased was so interwoven with the statement of his death that the two things were inseparable." Hence, we submit it was error to give claimant in the charge given to the jury, the benefit of a presumption which was dissipated by her own testimony in detailing the circumstances of the death.

Lilienthal's Tobacco *v.* United States, 97 U. S. 237.

The charge declares that the instinctive love of life, common to mankind, is a basis for the presumption that the assured did not take his own life. It is true, we concede, that this instinct may be properly considered and weighed by the jury, in connection with the facts and circumstances of the case in determining the probabilitiess, but it creates no presumption. The same question has arisen in actions for negligence in those jurisdictions where it was necessary to prove not only that the defendant was guilty of negligence, but that the deceased was at the time exercising proper caution to avoid injury; and it was contended that this instinct of self-preservation was so powerful, that in the absence of any evidence it would supply the proof by creating a presumption that he was using lawful care at the time; but the doctrine urged was denied.

In Reynolds *v.* N. Y. Central R. R. Co., 58 N. Y. 248, where the proposition arises, the court says: "Doubtless the jury might infer that deceased was governed by the natural instinct of self-preservation and would not put himself recklessly and consciously in peril of death, but that men are careless and subject themselves to injury is the common experience of mankind, and when injured no presumption exists, in the abscence of proof, that they were exercising due care at the time."

There is another aspect of this case which is entirely inconsistent with the charge of the court below as to the burden of proof. Every man is presumed to be sane until the contrary is shown, and is therefore supposed to contemplate the natural consequences of his own acts. Had it appeared in the case at bar that a third party fired the fatal shot, the law without further proof would have implied malice, and the burden would have been shifted upon said party to exculpate himself. York's case, 9 Met. 93. Likewise, had an eye-witness observed deceased point the weapon at his breast and discharge it, the presumption of law would be that he intended to perpetrate the deed thus accomplished; and, although in fact he might not have known the weapon was loaded, or might not have intended to discharge it, the burden of proof would have been imposed upon claimant to establish such fact and show thereby that the killing was accidental.

All the circumstances in this case without contradiction bear witness to the fact that it was the hand of the deceased that fired the fatal shot; and if it was not intentional on his part, the burden of establishing the fact was on plaintiff.

In case of Bois *v.* Mut. Life Ins. Co., decided by the Court of Appeals in New Orleans, and reported in 14 Ins. Law Journal, 237, where the deceased was found dead in his room, as the result of a pistol shot wound, there was no direct evidence as to the manner of his death, but circumstantial evidence supported the inference that the wound was self-inflicted. Held, "Where the person whose life is

insured has occasioned the discharge of a pistol which kills him, the burden of proof is on the beneficiary to show that the discharge of the pistol was accidental. The same presumption that men contemplate the natural consequences of their act applies to policies of insurance as well as to civil and criminal matters."

The same principle is implied in Accident Ins. Co. *v.* Crandall, 120 U. S. 527, where the circumstances disclose the fact that assured had taken his own life, and it therefore became necessary for plaintiff, in order to recover, to show that the deceased, by reason of insanity, was not responsible for his death.

There is a dearth of authorities upon the phase of the question which we have been discussing. Several text-books recite, as a general proposition, that when a violent death occurs which must have been either accidental or suicidal, the presumption is against the latter. The only case cited is Mallory *v.* The Traveler's Ins. Co., 47 N. Y. 52. The report of the case is quite meager, neither the issues presented by the pleadings, nor the instructions, are given; and it is impossible to learn how this question arose or was determined, the main questions in the case being as to misrepresentations and insanity. It appears simply that deceased, who was insured against death by accident, was last seen walking toward a bridge across a stream, and his remains were subsequently found in a pool near the bridge. There was a wound on the head. Whether inflicted before or after falling in the water does not appear, nor whether death was caused by wound or drowning. The court in discussing the reasonableness of a verdict in favor of plaintiff merely says: "From the facts above it appears either that death was caused by such an injury or the suicidal act of the deceased, but the presumption is against the latter. It is contrary to the general conduct of mankind. It shows gross moral turpitude in a sane person. That it resulted from the former cause was to some extent rendered more probable by the wound on the head of the deceased, and

the break in the corresponding part of his hat. It was for the jury to say how it was caused, and to determine its effect upon the question, whether the death was the result of an accidental injury, or whether the deceased had destroyed his own life."

The question thus appears to have been left to the jury unhampered by any instructions as to presumption to determine from all the evidence whether the death was accidental or otherwise. The above action was by the widow. The daughter also brought suit upon a similar policy against the same company. The case is digested, but not reported, in 54 N. Y. 651. We however find a report of this case published in Ins. Law Journal, Vol. 2, page 839. Upon appeal by defendant the judgment was affirmed upon the authority of the previous decision, the judge stating that he would freely admit that plaintiff's case was not free from difficulty, and further says: "It is unquestionably true that it was incumbent on plaintiff to give evidence sufficient to convince the jury that the death was the result of an accident, and this was done." So that it appears that plaintiff recovered, not by the force of any presumption, but as the result of affirmative evidence, satisfying the jury that the death was occasioned by accident.

In case of De Gorgoza *v.* Knickerbocker Life Ins. Co., 65 N. Y. 232, it appeared upon trial in the lower court, "that deceased was found in his room in his own house dead; a pistol having been discharged by his own hand into his mouth, the pistol belonged to his son, and there was no evidence that deceased knew it was loaded, and there was no evidence of the circumstances of his death except what appeared when he was discovered dead."

The *nisi prius* judge left it to the jury to find whether the death of the assured was occasioned by an accidental discharge of the pistol while it was in his hand, and charged them, if they so found, to return a verdict for plaintiff. Upon appeal by defendant, the appellee relied upon Mallory *v.* Ins. Co., *supra*, as an authority for submitting the

question of accidental death to the jury. The Court of Appeals reversed the case upon this proposition, and the judge, in announcing the opinion, says: "I am of the opinion that it was error to submit such a question to the jury. There was no evidence that Gorgogas' death was what we consider accidental, and no such question should have been submitted to the jury."

In the foregoing case there was no direct evidence that the deceased himself discharged the pistol. That conclusion was simply a matter of inference from surrounding circumstances. The material facts in said case correspond with the facts in the case at bar. There was not the slightest evidence in either case to show that the killing was accidental; nor was there any evidence in either case, except the surrounding circumstances, to show that the death was suicidal. In said decision, the Court of Appeals in effect declared that no presumption existed that the death was accidental; otherwise it would have been proper to have submitted the question to the jury upon the theory of accident. If the principle of that decision be applied to the charge in the case at bar, it completely overturns the doctrine of presumption as therein announced.

In case of Shanks *v.* United Brethren Mut. Aid Soc., 84 Pa. St. 385, which was an action upon an ordinary life policy, the defendant pleaded suicide as a defense. It appeared in evidence that within an hour previous to the death of the assured he was walking in the garden in company with his wife, and left her, stating that he would go to his room and read the paper. In a few moments she went to the room, and found her husband lying on the bed dead. He was shot through the head, and a pistol, with one barrel discharged, lying on his chest. The pistol had evidently been fired in close proximity to the head. There was nothing in the conduct of the deceased to indicate any intention to commit suicide, and there was no known motive for the act. There was no further evidence upon the subject. It was insisted that there existed in favor of

plaintiff the presumption that the death was accidental, and plaintiff prayed the court to charge the jury that there was no evidence that assured took his own life. This the court declined to do, but submitted the question to the jury to determine from all the circumstances whether the death was an act of suicide or not, telling them that they must be satisfied that said death was the result of suicide, in order to justify a verdict for defendant. A verdict was thereupon rendered for the defendant, and upon appeal was affirmed, it being held by the Supreme Court that "suicide is a question of intention, to be inferred from the circumstances, where no direct evidence exists. The circumstances in this case were sufficient to go to the jury on this question. Indeed, there was no other means of determining the intention of the alleged suicide."

The case at bar is much stronger than the one cited in two particulars. In the former a satisfactory motive for suicide is clearly shown by uncontradicted evidence, and the question of liability was presented by general denial whereby the burden of proof was cast upon claimant. Had the same charge in the case at bar been delivered to the jury in the case cited, there can be little doubt that the mind of the jury would have been so weighed down and controlled by the imaginary force of the alleged presumption as to have prevented any consideration of the mere circumstances indicating suicide.

But we consider that the terms of this particular policy relieve us from further discussion of the general proposition concerning presumption and the burden of proof.

The leading clause in the policy obligates the insurance company to pay the sum insured to the beneficiary within ninety days "after sufficient proof" that the death of the insured was occasioned "by injuries effected through external, violent and accidental means," and it is further stipulated that "this insurance shall not be held to extend to any case of death or personal injury unless the claimant under this policy shall establish by direct and positive proof

that said death or personal injury was caused by external violence and accidental means."

The policy further provides that in case of death resulting from such injury "direct and affirmative proof" that the same was accidental and that death resulted therefrom shall be furnished to the company. The proofs of death as furnished did not satisfy the conditions of the policy, inasmuch as it was not shown that the death was accidental. This failure justified the company in its refusal to pay, and it was entitled upon trial of the cause to require that the claim should be established in the manner provided by the contract; that is to say, by direct and positive proof instead of presumptive evidence. This stipulation as to direct and positive proof of the accidental death was a condition annexed to the acquisition of any right of action, and was properly a subject of contract between the parties. It does not concern or affect the remedy which is created and regulated by law.

There can be no misunderstanding as to the meaning of the phrase "direct and positive proof." It is uniformly interpreted by the commentators as being distinguished from presumptive and circumstantial evidence. Greenleaf's Evidence, sec. 13. Taylor on Evidence, sec. 65. Best's Principles of Evidence, sec. 293. Therefore, if the provision be valid, it certainly imposed upon plaintiff the burden of proving affirmatively that the death was caused by accidental injuries and forbids that such proof shall be accomplished by mere presumption resting on no basis of fact. Whether the provision be considered as a condition precedent to any right of action, or be considered as contemplating and directing the character and quality of evidence necessary to establish a liability in the event of proof, we see no objection which can be urged against its validity. In neither aspect does it contravene the policy of the law. The object is not to deprive the legal tribunals of their proper jurisdiction. It does not seek to exclude competent evidence or admit illegal testimony, but as a safeguard fixes and determines by mutual agreement the measure of

proof or degree of certitude necessary to establish a liability. Had the stipulation been to the effect that in all cases of death by violence the fact that the same was accidental should be shown by an eye-witness, we can imagine no reason why such stipulation, properly expressed in the contract, should not prevail.

When a party disappears from his associates and remains absent and unheard of for a period of seven years, the law presumes that he is dead. His estate may be administered upon and the collection of life insurance enforced upon this presumption of death; yet if the policy contained a stipulation against such disappearance and required that in all such cases death should be established by evidence, it will not be disputed that such condition would be valid. The principle involved in the stipulation in the present policy is just the same. The company for its own protection contracts that the fact creating a liability shall be shown not by a presumption, which might prevail in ordinary cases, but by direct and positive evidence.

We submit that the provision in this behalf contained in the present policy is judicious and reasonable, and was properly designed to guard the company against fraud and imposture.

No better illustration of its wisdom and justice can be found than the case at bar, where the beneficiary failed to furnish any evidence bringing the death within the terms of the policy, but seeks in lieu of evidence to avail herself of an artificial presumption, thereby requiring that the insurance company, in order to escape liability, shall assume the burden of disproving the vital issue which it was designed by the contract she should first establish by direct and positive evidence.

The propriety and efficacy of such a provision in a similar policy were recognized and approved by the Court of Appeals in Virginia in the recent case of the United States Mutual Accident Association *v.* Newman, 3 S. E. Reporter, 805, where it was held it was correct to charge the jury "that to entitle plaintiff to recover in this action she must estab-

lish by direct and positive proof that deceased died from bodily injuries effected through external, violent and accidental means, and that his death was caused alone by such external violence and accidental means, and the burden of proving this by direct and positive evidence rests upon the plaintiff."

In the case of Pollock *v.* U. S. Mut. Accident Assn., 102 Pa. St. 230, where the policy contained the same provisions, the court said: "The object of the company is to insure against bodily injury caused by external, violent and accidental means, not injuries caused by any of these means, but by all of them combined. Hence the certificate expressly declares that the benefit shall not be held to extend to any case of death or personal injury unless the claimant shall establish by direct and positive proof that the death or personal injury was caused by external, violent and accidental means."

As to the policy of the law and the extent which courts will recognize and enforce conditions annexed to a contract, we cite as leading cases:

U. S. *v.* Robertson, 9 Peters, 319;
Condon *v.* South Side R. R. Co., 14 Grat. 302;
President, etc., *v.* Pa. Coal Co., 50 N. Y. 250;
Braunstein *v.* Accidental Death Ins. Co., 1 Best & Smith, 799;
Worsely *v.* Wood, 6 Term. 710;
Scott *v.* Avery, 5 House of Lords, 811.

II.

Death as the result of murder is not an accident, according to the popular and ordinary sense of the word, but even if it were, such death is excluded from the present policy by the provision concerning "intentional injuries inflicted by the insured or any other person."

The court charged the jury that if they should find from the evidence that assured was in fact murdered, such death

was an accident as to him, within the meaning of the policy.

In our opinion, the evidence clearly shows that the death of assured was voluntary, but such evidence is circumstantial, and, while amply sufficient to satisfy the requirements of a civil action, does not exclude every other hypothesis.

His death may possibly have been a homicide. He may not have been a defaulter, and the treasurer's safe may have been only partially rifled in order to prevent suspicion. These, however, are mere possibilities, and are supported by no evidence whatever. Consequently, as we conceive, it was erroneous to submit the case to the jury upon the theory of murder. It furnished an opportunity to return a verdict for claimant based upon conjecture of murder. The instruction was calculated to mislead the jury, and must have induced belief on their part that in the opinion of the court there was evidence to warrant a finding that deceased was murdered and did not therefore die by his own hand, and for aught that appears to the contrary such finding may have been the basis of the verdict. But independently of this objection, we submit the charge of the court in this behalf was erroneous. It is, as we submit, a misconstruction of the policy.

There is not sufficient uniformity in the definitions of the term "accident" as used by policies of this class to enable us to say that the meaning has been judicially settled.

In case of Accident Ins. Co. *v.* Crandall, 120 U. S. 527, the insurance was against death or injuries "effected through external, accidental and violent means," and contained an exception against "self-inflicted injuries." It appeared that the insured hanged himself while insane.

This court decided that such injury was not "self-inflicted," and that the resulting death was an "accident," because "it was no more his act, in the sense of the law, than if he had been impelled by an irresistible physical power."

We observe nothing in the opinion, expressed or implied, indicating that such death would have been held accidental

had it appeared that deceased was purposely hanged by a third party.

In Ripley *v.* Railway Passenger Assurance Co., 2 Bigelow's Ins. Rep. 738, the court having decided the case in favor of defendant upon a different proposition entirely, remarks *obiter* that death resulting from an assault by highwaymen was perhaps an accident within the meaning of the policy, and says *arguendo*, perhaps, in a strict sense, any event which is brought about by design of any other person is not an accident, but "I think, in construing policies of insurance against accident, issued to all sorts of people, a majority of whom don't, as the company well know, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract, as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called an accident. The company fix the terms of the contract, and are to be held, in the absence of *plain* and *unequivocal exceptions* and *provisos*, to intend what in popular acceptation the insured party is likely to understand by its terms. The question, perhaps, is not entirely free from doubt. I find no case in which the exact point has been decided, but it does not become as material in this case as though the rights of the parties turned upon it."

We do not think that if the insured should provoke an attack, that a death thereby resulting, although unexpected to him, could be called an accident. Neither would we consider the death an accident in any sense of the word if a third party should without provocation deliberately fire a shot through the heart of the insured. It would be a casualty, but not an accident within the popular sense of the word. It is the meaning of the word in its popular sense which should control the court in interpreting and determining its accepted meaning as used in the policy.

But in the case at bar the company has followed the suggestion of the court in the case last above cited (Ripley *v.* Ins. Co.), and by "*plain and unequivocal*" terms of the

policy, has defined an accident, and provides that no claim shall be made thereunder if the death be caused by "*intentional* injuries inflicted by the insured *or any other person.*"

The court, by the construction given to this clause, declares in its charge to the jury that it only includes injuries inflicted by the insured intentionally upon himself, or inflicted with his consent by a third party. Such a construction, we submit, is forced and unnatural and in violation of ordinary rules. It denies any operation, force or effect to the concluding words of the clause. Had it been the intention that the contract should express the meaning as declared by the trial court, it would have been necessary only to say that no claim shall be made under this policy when death results from "intentional injuries inflicted by the insured."

If the insured should purposely shoot himself, or procure a third party to do so, the injury suffered in either case would clearly be intentional on the part of the insured, and, therefore, within the excepting clause. But the policy, with the view of further limiting the liability of the company, adds the words "or any other person." So that the only intelligent and consistent interpretation is, that the clause was expressly designed to except, not only injuries intentionally inflicted by the insured, but likewise injuries inflicted by the intention of any other person.

The company claims no exemption under this clause save where there was an actual and particular intent to injure the party insured. Consequently, the illustration of the court below in its charge upon this subject as to a car maliciously derailed and passenger fatally injured, is without force or application. No one would pretend that such a disaster would not be an accident within the meaning of the policy.

It is most improbable that a violent injury designed to occasion death should in any case be inflicted upon the insured at the hands of a third party by the procurement of the insured.

Secrecy and solitude are the customary incidents of suicide, and it is most unnatural that one contemplating self-destruction by violence should invoke the aid of a third party. The extreme improbability of such an occurrence shows that such a risk was too remote to require any provision concerning it, and this improbability is a forcible argument against the construction of the court.

Had the policy expressed an exception against "intentional injuries" without further words of qualification, we should say that the term used included all intentional injuries, whether resulting from the intent of the insured or the intent of a third party; but, in order to silence all doubt upon the subject, the following words are superadded: "inflicted by himself or any other person."

The meaning and intent of the parties as thus expressed in this contract seems so clear as not to require interpretation or admit of construction. The manifest object of the company in inserting this clause was to secure protection against liability for death caused by willful injuries, and the question is, did both parties so understand the phrase, or, rather, is the language such that they must be held to have so understood it?

The rule *contra proferentem* is applicable to all contracts, and is applied by courts somewhat vigorously to insurance contracts; but the rule does not go so far as to authorize a construction against the promisor merely because that view is *possible*, and courts will go no further than to hold the promisor liable to the extent which the other party ought to understand from the terms of the instrument, when viewed in the ordinary and commonly received acceptation and no construction should be adopted which would render the words used, senseless. "The policy is a contract. Its language is to receive a reasonable interpretation. Full legal effect should always be given to it for the purpose of guarding the company against fraud and imposition. U. S. Mut. A. C. Assn. *v.* Newman, Supreme Court of Appeals Virginia, Nov., 1887, 3 S. E. Rep. 805."

"Such contracts are open to construction like all other contracts needing interpretation, but are subject to it only when upon the face of the instrument it appears that its meaning is doubtful, or its language ambiguous or uncertain, otherwise there is no room for construction, and nothing for construction to do. * * *

Courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or rules of law. * * *

The legal effect of this contract can be avoided only by making a new one for the parties, or denying any significance to language."

Dwight *v.* Ins. Co., 103 N. Y. 341.

To apply the language of a recent decision to the clause under consideration, we would say: "If language as plain and unambiguous as this, is not only to be twisted out of its natural meaning, but is to be wholly ignored by courts of justice, it will be useless in the future for companies to make any effort to bind policy holders," or, we may add, protect themselves.

Holly *v.* Mut. Life Ins. Co., 105 N. Y. 437.

The case of Pollock *v.* Accident Association, *supra*, shows that the policy contained a similar provision, in the following language: "The benefits do not extend to cases where the injury is the result of design, either on the part of the member, or of any other person."

There could be no misunderstanding as to the meaning intended and expressed by said clause, and we submit that said meaning is not a particle more clearly or definitely expressed than in the clause now under consideration.

A great majority of modern accident policies contain similar provisions. It is well understood that the companies thus intend an accurate definition of the term "accident," and to limit their liability accordingly. This they

have a perfect right to do, and it has not been questioned until the present decision which seeks to defeat that end by a construction which, we submit, is in violation of elementary rules.

III.

Claimant's case was not supported by any evidence that the death was accidental, but the contrary clearly appeared by uncontradicted testimony.

The charge to the jury was misleading.

If it be true, as we have insisted, that the burden of proof was upon claimant to show affirmatively that the insured died by accidental violence, then it must be conceded that she has signally failed to make out her case, and it was consequently error on the part of the court to submit the case to the jury. Chandler *v.* Van Roeder, 24 Howard, 224. Improvement Company *v.* Munson, 14 Wall. 442.

"Suicide" and "intentional injury inflicted by a third party" are defenses included within the provisos and exceptional clauses of the policy, and were formally pleaded as such; but, as we have before stated, such defenses in no wise impaired the scope or effect of the preceding general denial.

Defendant's case was tried upon the issues raised by said denial, and, while it is true that the testimony adduced by defendant tended to show suicide, yet it was competent under the general issue as negativing the allegation of the petition that insured died by accidental means.

Hence, we submit that the burden of proof was imposed upon claimant by the frame of the pleadings, and, in addition to this, by the stipulation in the policy requiring her to establish the accidental death by "direct and positive proof." But, conceding that, *in limine*, she was entitled to the benefit of a presumption that the death shown to have occurred by violence was accidental, still we submit that such presumption was rebuttable and was effectually

overcome by the uncontradicted evidence in the case showing that his death was suicidal.

"Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and, still more, must give place when in conflict with clear, distinct and convincing proof." Fresh *v.* Gilson, 16 Peters, 331.

The conduct of deceased on the evening of his death, his financial embarrassment, the fact that he was a defaulter, that exposure and disgrace, if not penal servitude, inevitably awaited him on the following day, the condition of his official books, unbalanced as they were, clearly showing that he did not expect or intend to surrender to his successor, on January 2d, as he had promised, and that he was in no situation to do so, — these facts, in connection with the circumstances of his tragic death, the "near wound" through the heart, caused by a pistol belonging to the store which he had no occasion to use or handle, the hour and place of the occurrence, and the condition of the safe, all lead to but one conclusion as to the manner of his death and are entirely incompatible with any presumption that his death was accidental.

There is not the slightest conflict in the testimony in any particular. No effort was made in behalf of claimant to explain or account for his death. All the facts concerning her husband's career, habits, condition and death were peculiarly within her knowledge, and if there was any evidence calculated to shed a favorable light upon the subject and repel the imputation of suicide, she could readily have produced it.

We respectfully insist that it was the duty of the court, at the conclusion of the evidence, to have directed a verdict for defendant, and that a submission of the question to the jury on behalf of claimant was error.

Plaintiff's case, according to the theory of the trial court, rested solely upon the presumption declared to have existed in her favor, and when said presumption was over-

come and faded away by force of uncontradicted evidence to the contrary, her case no longer had any foundation.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the judge to determine, and that is whether there is any evidence upon which a jury can properly proceed to find a verdict in favor of the party having the affirmative. Anderson County Commissioners *v.* Beal, 113 U. S. 227. Bayliss *v.* Travelers' Ins. Co., 113 U. S. 316.

There was no issue of insanity in the case, nor was there any evidence upon the subject; but the Court took occasion to charge the jury that insanity is, in law, an excuse for suicide, and that suicide, in connection with other facts tending to that conclusion, strengthens the presumption of suicide. This, we submit, was clearly improper, and could only serve to embarrass and mislead the jury by withdrawing their attention from the real issue. It was, in effect, an endorsement by the Court, giving the jury latitude to indulge in conjecture as to the possible insanity of insured, and thereby fix a liability upon defendant on the theory that insured might have been insane, and, therefore, not responsible for the act of suicide. It is not necessary for us to demonstrate that the instruction must have misled the jury. It is sufficient to establish the error, if it appears that it *may* have done so. The charge, we submit, is erroneous in going outside the case and instructing the jury touching the law applicable to facts of which there was no evidence. Beavan *v.* Taylor, 1 Wall. 637; Jones *v.* Benthuysen, 103 U. S. 87.

The charge further directs the jury that if they believe from the evidence, that insured was in fact murdered, they must return a verdict for the claimant. There was not a *scintilla* of evidence in the case that insured was murdered, yet the charge tells the jury that, if murdered, the defendant is liable, and, in legal effect, says that there is evidence before them that will warrant a conclusion and finding on their part that he was in fact murdered. This issue was sub-

mitted to the jury, in behalf of claimant, as furnishing a theory whereby the jury could avoid the force of the evidence tending to show suicide, and still fix a liability upon the company by finding that insured was murdered.

The Court charged, in the same connection, that the law would not presume murder. The charge, therefore, was equivalent to a declaration that there was affirmative testimony in the case which would support a finding of murder. The vice of said charge is, as we conceive, manifest at a glance. It submits a question to the jury not raised by the evidence. Ward *v.* U. S., 14 Wall. 28. It assumes the existence of a fact of which there is no evidence. Jones *v.* Randolph, 104 U. S. 108; Railroad Co. *v.* Houston, 95 U. S. 697. It is based upon a theory unsupported by evidence. Michigan Bank *v.* Eldred, 9 Wall. 544; Davis *v.* Patrick, 122 U. S. 138.

When we come to consider the charge of the Court upon the whole, its declarations as to presumptions and burden of proof, the unsupported theories of insanity and murder as advanced, together with the manner in which the case was submitted by the Court to the jury as to the evidence, the verdict ceases to be a surprise. Verdicts are conclusive as to facts, but it is impossible to say what fact is established by this verdict. Under the charge of the Court, the jury may have found that insured was murdered, they may have found that he committed suicide while insane, or they may have found simply that defendant failed to overcome the presumption which supported claimant's case and satisfy them that insured died by his own hand.

A verdict in favor of claimant upon the evidence disclosed by this record cannot be upheld as just or meritorious, and, by reason of the errors herein assigned, we respectfully ask that the judgment be reversed and the cause remanded.

B. D. LEE,
JOHN P. ELLIS,
Attorneys for Plaintiff in Error.

127-661

Supreme Court U. S.
FILED.
MAY
JAMES H. MCKENNEY.
CLERK

ARGUMENT OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. ~~123~~ 273

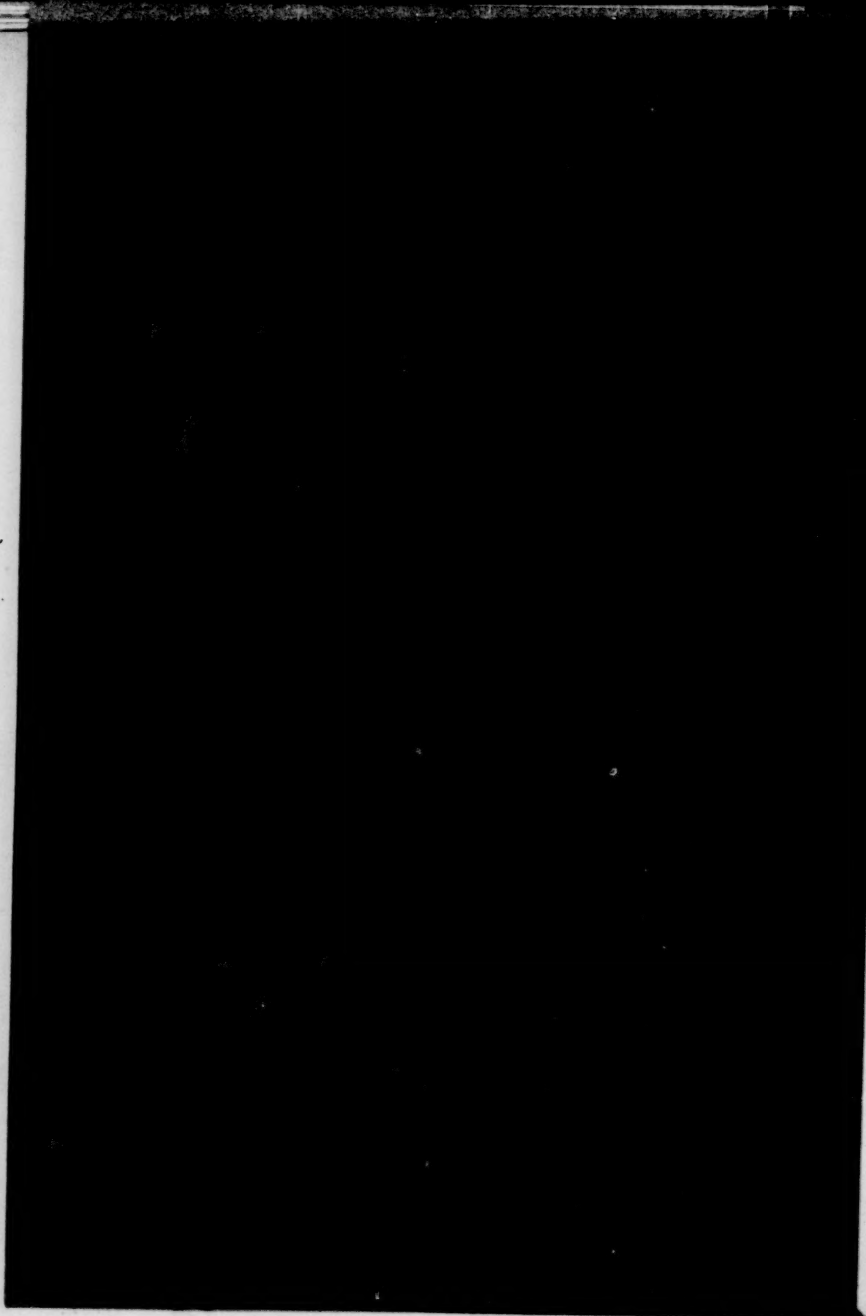
THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR.

vs.

SADIE P. McCONKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

ARGUMENT OF DEFENDANT IN ERROR.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. 123.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR.

vs.

SADIE P. McCONKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

ARGUMENT OF DEFENDANT IN ERROR.

This action is brought on a policy issued by plaintiff in error. The Traveler's Insurance Company, of Hartford, Connecticut, dated November 7th, 1882, issued to George P. McConkey, for the benefit of his wife, Sadie P. McConkey, defendant in error herein. It is admitted that the insured died on the 2d day of January, 1883, and that the proper notice of death and loss was given the Company, see (record page 19) as required by the policy and notwithstanding the fact that the notice was given, the company failed to pay the amount named therein or any part thereof. And why they failed or refused to do so, does not appear until they filed their answer herein.

The defense herein, as set out in the answer and contained in four separate paragraphs, are in fact but two, to-wit:

1st. That the death of the insured was caused by suicide.

2d. That the death of the insured was caused by intentional injuries inflicted by some other person than the insured.

I.

It seems to us that it would be a waste of time and an imposition upon this Court, to elaborate an argument in refutation of the charge of suicide. Suffice it to say, that this defense, when made, is not accepted by courts only in cases where it is clearly established by the evidence, that the insured did take his life and that when he committed the act, his reason was not so impaired but that he could understand the moral character of the act. No such question arises in this case. The defense is simply that the insured committed suicide. Yet, there is not a word of evidence introduced, even showing or tending to show, that he took his own life. But admitting that the facts and circumstances appearing from the evidence in this case creates a mere suspicion that the death of the insured was violent and was caused either by intentional injuries or a suicidal act of the deceased, the presumption of law is against both and must be fairly proved. See case of Mallory vs The Traveler's Insurance Company, 47th, N. Y. (2d Sickles, 52.) In the case cited the insured was seen walking towards the R. R. bridge, and a few days after his body was found in the pond, near the bridge. The policy embraced cases of accident and the Court says: "From the facts above, it appeared, either that the death

"was caused by such an injury, or the suicidal act of de-
"ceased, *but the presumption is against the latter.* It is
"contrary to the general conduct of mankind. *It shows*
"*gross moral turpitude in a sane person.*" See also case of Penfold vs. Universal Life Ins. Co., 85 N. Y., 317; Phillips vs. Louisana Equitable Life Ins. Co., 5th Bigelow Life Ins., 165; 26th Louisana 404; 3 Ins. Law Journal, 579; Bliss on Life Insurance (1st Ed) 360, 362 and 587; 80th Illinois, 35; and 57 Penn. St. 380; Wharton Ev. Sec. 1247, 355, 356 and notes.

II.

Again, whether or not the insured committed suicide, was in this case, a question of fact for the jury to determine from the evidence, and they having found against this defense, the Court will not interfere with the finding, unless so clearly against the weight of testimony, as to show passion and prejudice, by which the party has been wronged. Here in this case, there is no conflict in the evidence and none which could be considered as establishing the fact of suicide. The presumptions of law are against this plea; are against the charge of murder, and will not presume that McConkey killed himself or that any other person would commit the crime of murder. All presumptions of law are in favor of innocence and it imputes no crime to any one. But crimes charged must be proved and as in this case, the evidence, leaving the death or rather the cause of death as a mystery, the law raises no presumption in favor of murder or suicide.

1st. That the death of the insured was caused by suicide.

2d. That the death of the insured was caused by intentional injuries inflicted by some other person than the insured.

I.

It seems to us that it would be a waste of time and an imposition upon this Court, to elaborate an argument in refutation of the charge of suicide. Suffice it to say, that this defense, when made, is not accepted by courts only in cases where it is clearly established by the evidence, that the insured did take his life and that when he committed the act, his reason was not so impaired but that he could understand the moral character of the act. No such question arises in this case. The defense is simply that the insured committed suicide. Yet, there is not a word of evidence introduced, even showing or tending to show, that he took his own life. But admitting that the facts and circumstances appearing from the evidence in this case creates a mere susp'cion that the death of the insured was violent and was caused either by intentional injuries or a suicidal act of the deceased, the presumption of law is against both and must be fairly proved. See case of Mallory vs The Traveler's Insurance Company, 47th, N. Y. (2d Sickles, 52.) In the case cited the insured was seen walking towards the R. R. bridge, and a few days after his body was found in the pond, near the bridge. The policy embraced cases of accident and the Court says: "From the facts above, it appeared, either that the death

"was caused by such an injury, or the suicidal act of de-
"ceased, *but the presumption is against the latter.* It is
"contrary to the general conduct of mankind. *It shows*
"*gross moral turpitude in a sane person.*" See also case of Penfold vs. Universal Life Ins. Co., 85 N. Y., 317; Phillips vs. Louisana Equitable Life Ins. Co., 5th Bigelow Life Ins., 165; 26th Louisana 404; 3 Ins. Law Journal, 579; Bliss on Life Insurance (1st Ed) 360, 362 and 587; 80th Illinois, 35; and 57 Penn. St. 380; Wharton Ev. Sec. 1247, 355, 356 and notes.

II.

Again, whether or not the insured committed suicide, was in this case, a question of fact for the jury to determine from the evidence, and they having found against this defense, the Court will not interfere with the finding, unless so clearly against the weight of testimony, as to show passion and prejudice, by which the party has been wronged. Here in this case, there is no conflict in the evidence and none which could be considered as establishing the fact of suicide. The presumptions of law are against this plea; are against the charge of murder, and will not presume that McConkey killed himself or that any other person would commit the crime of murder. All presumptions of law are in favor of innocence and it imputes no crime to any one. But crimes charged must be proved and as in this case, the evidence, leaving the death or rather the cause of death as a mystery, the law raises no presumption in favor of murder or suicide.

III.

The rule is so clearly stated by the learned Judge, before whom this case was tried, in his charge to the jury, that we can not do better than quote from the same as found on p. p. 52 and 53 of the record, he says:

"It is manifest that self destruction can not be pre-
sumed. So strong is the instinctive love of life in the hu-
man breast and so uniform the efforts of men to preserve
their existance that suicide can not be presumed." "The
"plaintiff is therefore entitled to recover, unless the defen-
"dant has, by competent evidence, overcome this pre-
"sumption and satisfy the jury by a preponderance of the
"evidence, that the injuries which caused the death of the
"insured, were intentional on his part; neither can mur-
"der be presumed." Bank of the United States vs Dan-
bridge 12, Wheat p. 69, (7 Curtis p. 33), Life Insurance
Company vs Terry, 15, Wall 580, 26 Louisanna, Ameri-
can 404, Mallory vs Insurance Company, 47, N. Y. 52.

The same rule is adopted by the Supreme Court of Iowa, so far as it relates to the desire to preserve life, as a proper consideration for the jury in connection with the facts in evidence. See Greenleaf vs The I. C. R. R. Co. 29th, Iowa, 48; also, Allen vs Willard, 57 Pennsylvania State 380. We call attention to another familiar rule, which is: "words of a forfeiture in a policy of insurance
"are to be construed against the underwriter. 98th Mass.
"381, 32nd Pennsylvania St. 351." We do not desire further to answer this plea of suicide.

IV.

As to the second plea, that the death of the insured was caused by intentional injuries inflicted upon him by some other person.

The instruction of the learned Judge to the jury upon this plea says, (see p. p. 53 and 54 of record.) "Neith-"er is murder to be presumed by the jury. Crime is never "to be presumed but if the jury find from the evidence, "that the insured was, in fact, murdered, the death was an "accident to him the same as if he had been killed by the "falling of a house, or the derailment of a railway car in "which he was a passenger."

Has not the learned judge stated the law in the case clearly, fully and in strict accordance with justice.

If the insured was murdered by some one, even intentionally, it was to the insured, accidental, as to him, and the words of forfeiture found in the policy in suit and so confidently relied upon by defendant, to defeat a recovery herein, as follows: "*Or intentional injuries inflicted by the insured or any other persons.*" Admit, for the purpose of argument only, that he was by some one other than himself, murdered; would plaintiff thereby, for whose sole benefit the policy was issued, be defeated in a recovery. If so it would be, in face of the fact, that an accident unlooked for, unsought and unsolicited on part of the insured, avoids the policy. This, to our minds, would be an unwarranted construction, for while it is allowable, for the company to guard against fraud, practiced by the insured and expressly provide against liability for

an injury purposely inflicted, by the insured upon himself, or for any injury which he might procure another, to inflict upon him for the very purpose of receiving the benefits provided for in such policy.

And this clause cannot receive any construction which would go any further in shielding the company from liability, than the one we have just suggested. We, at the same time, deny that the construction asked for by defendant can be given to that clause and that the rule laid down by the Judge in his charge, above quoted, is the true one. Accidental Insurance Company vs Crandall 120, U. S. 527, 532. Penfold vs Iusurance Company 65 N. Y., 317, and cases cited on page 319, 1 Phils Ev. Cowen Hill & Edwards, notes 598, 732, 604 notes.

The plaintiff in error has, in the assignment of errors, stated and re-stated them in many forms, but embrace only the two herein stated and in fact, the question of suicide being out of consideration, as we believe it is, the only question remaining is, did some one other than the insured murder him. Murder cannot be presumed. If so, what evidence have we in this case to warrant the conclusion beyond a reasonable doubt, or even by a preponderance of evidence, that he was so murdered. We submit, that the facts clearly established are, defendant was killed and that death resulted from a pistol shot, entering the body near the heart. Yet there is not a single fact proven that does not establish the fact of an accident, pure and simple. More certainly, more convincingly, than any other theory, or at least, can as readily be reconciled with such theory, as any other and so long as that is so, we would not be allowed to adopt any other and to support

this position, we again ask the attention of the Court, to the reasons given by the Court, in the case above cited of Phillips vs. Louisana Equitable Life Ins. Co., 5th Bigelow Life Insurance p. 165; same case in 26th, Louisana, p. 404; a much stronger case in favor of defendant's theory, than this, but not allowed.

The several instructions asked for by defendant and refused by the Court, except as explained and modified, and the serious exceptions made by defendant, are to those instructions given with the modifications. We insist, that the instructions, as given by the Court, embody the law fully and explicitly and both the question of suicide and murder were properly left for the jury to determine, as well as the fact as to whether or not death was accidental. See instructions, page 53 of the record, and the jury having found that death was caused by an accident, is conclusive, unless the verdict is so clearly against the law and evidence as to create a suspicion of fraud or undue prejudice. And further, if we, for the purpose of this argument, admit that the evidence is conflicting, yet it was clearly the province of the jury to reconcile it, and they having done so, the Court will not assume the province of the jury, because they might as jurors, have come to different conclusions. But, in this case, there is no conflict in the evidence; it either justifies the verdict or it fails to do so. But as we say, the verdict can not be disturbed, for reason of insufficiency of evidence or a conflict therein. The only question remaining is, did the Court err in his instructions to the jury. We have endeavored to show no such error was made and in the light of the authorities presented, we confidently submit the case and ask

that the law, as given in those instructions be approved by this Court.

We will be pardoned if we allude to the hardships imposed upon the plaintiff herein. Not for the purpose of securing sympathy, but to call attention to the course pursued by defendant, in hindering and delaying plaintiff in her attempt to collect her just dues. The cruel charge that deceased committed suicide, has not a shadow of evidence to support it. On the contrary, all the evidence agree in establishing the fact, that deceased and his wife lived together most happily, that he was sincerely attached to his home, wife and children. No pretense that he was in any manner embarrassed financially. His accounts as treasurer of the county, were correct, in October, 1882, at the time of his last settlement. He had money in the several banks when he died. He was ready to turn over to his successor in office, the money and books and as the evidence shows had offered to do so the day before, but was delayed until he could make final entries in his books relative to certain fees and that only, and when so engaged at his desk in the night was killed. The light used by him was out. He could not have extinguished it, for he was killed instantly. Money was found on the floor and the safe doors open. And the deficit in his accounts subsequently found, as claimed by defendant, can have no weight, for the reason that after he was killed, the safe and its deposits were open to any one base enough to rob and from the evidence, we may well conclude, that it was robbed of a large amount. However this may be, it casts no suspicion on the integrity of the deceased, nor does it even create a suspicion of any deficit in his accounts existing

prior to his death. While the amount in controversy is large, we may palliate many acts and shifts of defendant to avoid the liability, but to attempt to fasten a stigma on the dead and a lasting sorrow to his widow and orphan children, in the absence of all evidence, is inexcusable. Plaintff asks only simple justice. In the affirmance of the judgment herein it will be obtained.

W. G. THOMPSON and H. B. FOUKE,
Attorneys for Defendant in error.